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Nos. 334-335-336

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Appellant*,

v.

LESTER E. GRAINGER.

UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH C. CLAVERS and WILLIAM G. KENNEDY

UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH C. CLAVERS, WILLIAM G. KENNEDY and A. L. SHAPIRO.

Appeals from the United States District Court for the Northern District of Illinois.

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

No. 10,744

UNITED STATES OF AMERICA

v.

LESTER E. GRAINGER

No. 10,759

UNITED STATES OF AMERICA

v.

JOSEPH C. CLAVERE and WILLIAM G. KENNEDY

No. 10,767

UNITED STATES OF AMERICA

v.

JOSEPH C. CLAVERE, WILLIAM G. KENNEDY, and A. L. SHAPIRO

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United

States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the orders of the District Court in these cases dismissing the indictments.

OPINION BELOW

The opinion of the District Court dismissing the indictments has not been reported. A copy of the opinion is attached hereto as an Appendix.

JURISDICTION

The orders of the District Court dismissing the indictments were entered on December 5, 1952. The jurisdiction of the Supreme Court to review on direct appeal the decision of the District Court sustaining, prior to the attachment of jeopardy, the defendants' pleas in bar to the indictments is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court: *United States* v. *Goldman*, 277 U. S. 229, 236-237; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Barber*, 219 U. S. 72, 78.

QUESTIONS PRESENTED

Whether the offense wilfully and fraudulently making and presenting a false claim for payment to the Commodity Credit Corporation, a corporation in which the United States was a stockholder, involves fraud within the purview of the Wartime

Suspension of Limitations Act, which suspended the running, until three years after the termination of hostilities, of any statute of limitations applicable to offenses involving fraud against the United States.

STATUTES INVOLVED

Section 35(A) of the Criminal Code, which was in effect at the time of the offenses involved in the indictments (35 Stat. 1095, as amended; 18 U.S.C. (1946 ed.) 80), provided, in relevant part:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or

> deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.[1]

Section 1 of the Act of August 24, 1942, c. 555, 56 Stat. 747, as amended by Section 19(b) of the Act of July 1, 1944, 56 Stat. 667, and by Section 28 of the Surplus Property Act of 1944, 56 Stat. 781 (18 U.S.C. (1946 ed.) 590a), now revised as permanent legislation (18 U.S.C. (1948 rev.) 3287, *infra*), commonly known as the Wartime Suspension of Limitations Act, provided in pertinent part in 1945, when the offenses involved herein were alleged to have been committed:

> The running of any existing statute applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the

[1] Repealed and reenacted in substantially the same terms, although in separate provisions, as 18 U.S.C. (1948 rev.), 287 and 1001.

> President or by a concurrent resolution of the two Houses of Congress. * * *

18 U.S.C. (1948 rev.) 3287, which became effective on September 1, 1948, and was in effect on May 20 and June 27, 1952, the dates of the return of the indictments herein, provides in pertinent part:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.[2]

STATEMENT

These cases involve three indictments, filed May 20 and June 27, 1952. No. 10,744 charges the defendant, Grainger, and No. 10,759 charges the defendants, Clavere and Kennedy, with having, at various times during 1945, "unlawfully, knowingly, willfully and fraudulently" presented for payment to the Commodity Credit Corporation, "being then a corporation in which the United States * * * was a stockholder," certain claims upon the Corporation, "knowing said claim[s] to be false, fictitious and fraudulent." The claims in

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[2] The President proclaimed the termination of hostilities on December 31, 1946. 12 F.R. 1.

question were certifications by the defendants to the Commodity Credit Corporation, representing that the defendants had paid higher prices for the purchase of wool than were actually paid by them.[3] The consequence, of course, was to entitle them to larger sums from the Corporation.

The third indictment, No. 10,767, charges conspiracy to commit offenses against the United States by making false, fictitious and fraudulent claims upon the Commodity Credit Corporation as outlined above. One of the two counts in this indictment charges the defendants, Clavere and Kennedy, with such conspiracy, with overt acts on dates from April 30, 1946, to April 15, 1947. The other count charged the defendants, Clavere, Kennedy, and Shapiro, with overt acts on dates from September 23, 1946, to November 14, 1946.

All of the defendants moved to dismiss the indictments, principally on the ground that the prosecutions were barred by the statute of limitations.[4] It was urged that the Wartime Suspension of Limitations Act, *supra*, was not applicable, but

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[3] In addition, some of the counts against the defendants, Clavere and Kennedy, in No. 10,759, charged that those defendants made some claims as to wool stated to have been purchased on certain occasions when, in fact, no wool at all had been purchased on those occasions.

[4] It was also urged that the acts set forth in the indictment did not constitute offenses against the laws of the United States, and that it could not be ascertained from the indictments what sort of claims defendants had made against the Corporation.

that if it ever was, it was made inapplicable by its repeal on September 1, 1948; and if it was not made inapplicable by that repeal, still, the prosecutions were barred because they were not commenced by December 31, 1949, three years after the proclamation of termination of hostilities.

The District Court granted the motions to dismiss, holding that the Suspension Act did not apply to toll the running of the otherwise applicable three-year period of limitations because the statutes defining the offenses charged do not expressly "denominate" fraud against the United States as an element of those offenses.

THE QUESTION IS SUBSTANTIAL

The District Court has held that the offense of willfully presenting "for payment or approval" to a corporation in which the United States is a stockholder a claim known to be "false, fictitious or fraudulent", is not an offense involving fraud against the United States within the purview of the Suspension Act. We submit that this holding refutes itself by the mere statement. If a willfully false claim for payment does not represent fraud against the United States, it is difficult to know what fraud is.[5]

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[5] As the suspension statute is applicable to offenses involving defrauding the United States "whether by conspiracy or not", the decision of Case No. 10,767, involving an indictment for conspiracy to commit the offenses substantively charged in the other indictments, is clearly governed by the same considerations as govern cases No. 10,744 and 10,759.

The District Court, although recognizing that former 18 U.S.C. 80 includes two offenses—one for making false claims and one for making false statements—failed to recognize the differences in the nature of the two offenses. All the cases on which it relied, except *United States* v. *Scharton*, 285 U. S. 518, involved prosecutions for making false statements. If fraud as used in the Suspension Act is deemed to be narrowly confined to pecuniary matters, a false statement, which may or may not relate to pecuniary affairs, cannot be said necessarily to involve fraud as an element of the offense. It was on this reasoning that the Court of Appeals for the District of Columbia Circuit held in *Marzani* v. *United States*, 168 F. 2d 133, affirmed and reaffirmed by an equally divided court, 335 U. S. 895, 336 U. S. 922, that the Suspension Act did not toll the statute of limitations as to false statements by a government employee with respect to membership in subversive organizations. Similarly in *United States* v. *Obermeier*, 186 F. 2d 243, certiorari denied, 340 U. S. 951, the Court of Appeals for the Second Circuit held that fraud within the meaning of the Suspension act was not an element of the offense of making false statements in a naturalization proceeding. Cf. *contra*, *Bridges* v. *United States* (C.A. 9), decided November 18, 1952; see also *United States* v. *Gottfried*, 165 F. 2d 360 (C.A. 2), certiorari denied, 333 U. S. 860.[6]

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[6] The District Court erred in relying upon the Supreme Court's recent decision in *United States* v. *Beacon Brass Co.*,

Whatever differences of opinion there may be as to whether a false statement necessarily involves fraud as an element of the offense within the purview of the Suspension Act, there is no room for such diversity as to the false claims portion of former 18 U.S.C. 80. A false claim for payment or approval by definition relates to pecuniary matters and thus necessarily involves pecuniary fraud. The reasoning of the *Marzani* and similar cases thus has no application to the offenses here charged.

United States v. *Scharton*, 285 U. S. 518, involved false statements in income tax returns but was brought under Section 1114(b) of the Revenue Act of 1926, punishing any person "who willfully attempts in any manner to evade or defeat any tax." The Court held that such offense was not one involving fraud within the meaning of a special limitations section of the Act providing that the limitations period was three years except as to

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344 U. S. 43. In holding that the indictment there involved, alleging a wilful attempt to evade taxes under Section 145(b) of the Internal Revenue Code—an alleged attempt which was probably also a violation of former Section 35(A) of the Criminal Code—stated an offense within Section 145(b), the Court observed that the three year statute of limitations applicable to offenses under Section 35(A) had run (344 U. S. at 45). But the possibility that the statute had been tolled by the suspension statute was neither raised nor presented for decision in that case. What is important here, in any event, is that the offense involved in the instant case is of the type clearly comprehended by the suspension statute—whether or not false statements made in an attempt to evade taxes are so covered.

offenses "involving the defrauding or attempting to defraud the United States." The Court pointed out (p. 521) that under the section on which the indictment was founded, intent to defraud was not made an element of the offense, as it was in other specified offenses under the revenue laws. Accordingly, it held that the words "involving fraud" as used in the limitations provision of the Revenue Act must be limited to those offenses under the Revenue Act which made intent to defraud an element of the offense.

The offense here charged, however, contains the very element which the Court found absent from the offense involved in the *Scharton* case, i.e., intent to defraud. The statute defines the instant offense as the presentation for payment of a claim, "knowing such claim to be false, fictitious or fraudulent." A person who presents a claim for payment knowing it to be fraudulent must have the intent to defraud. Unless there is some magic attached to the very words "intent to defraud" so that no equivalent statement of this element of an offense will suffice to bring it within the suspension statute, then intent to defraud in a pecuniary sense is clearly an element of the offenses here charged. Thus none of the considerations discussed in the cases relied upon by the District Court have any application here.

It is submitted that the decision of the District Court is clearly erroneous and that the question

presented by this appeal is a substantial one which should be settled by the Supreme Court.[7]

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY, 1953.

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[7] Although not the basis of the decision below, there also lurks in this case the issue involved in *United States* v. *Klinger*, No. , this Term, in which the Government seeks review of the judgment of the Court of Appeals for the Second Circuit, entered November 3, 1952, holding that under the wartime statute suspending the "running" of any statute of limitations until three years after the termination of hostilities, the period of limitations began to run, not three years, but the day after, the termination of hostilities, with the result that prosecution of all offenses within the purview of the suspension statute was barred after December 31, 1949.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*

v.

LESTER E. GRAINGER, *Defendant*

No. 10,744

UNITED STATES OF AMERICA, *Plaintiff*

v.

JOSEPH C. CLAVERE and WILLIAM G. KENNEDY,
Defendants

No. 10,759

UNITED STATES OF AMERICA, *Plaintiff*

v.

JOSEPH C. CLAVERE, WILLIAM G. KENNEDY and
A. L. SHAPIRO, *Defendants*

No. 10,767

OPINION AND ORDER

The applicability of the Wartime Suspension of Limitations Act of 1942 or of its successor statute of 1948 is the crucial question presented by the motion to dismiss filed in each of these three cognate cases.

The indictment in No. 10744, filed on May 20, 1952, and the one in No. 10759, filed on June 27, 1952, charge violations of the False Claims Statute, 18 USC section 80 (1946 ed.). The indictment in No. 10767, returned on June 27, 1952, charges a conspiracy (18 USCA section 88 (1946 ed.)) to violate the False Claims Statute.

1. The Indictments

For the purposes of this decision, these three cases are controlled by the identical legal principles, and may therefore be considered together.

In No. 10,744, the defendant is charged with violations of the statute that dealt with "Presenting false claims", 18 USC section 80 (1946 ed.) (Criminal Code, section 35(A)), hereinafter referred to as "Section 80".[1] It is alleged that, at Stockton, California, he "unlawfully, knowingly, willfully and fraudulently" presented, etc., for payment, to the Commodity Credit Corporation, hereinafter re-

[1] In the new revision of Title 18, Section 80 was divided into two parts, the portion making it a crime to present false claims being retained as 18 USCA section 287, and the part relating to false statements becoming 18 USCA section 1001. See "Historical and Revision Notes", 18 USCA, volume containing sections 1 to 370, page 658. On its cover, Indictment No. 10744 erroneously cites 18 USCA 1001, although it plainly deals with false *claims*, and with offenses alleged to have been committed prior to September 1, 1948, the effective date of the new revision. Similarly, No. 10767 refers on its cover to 18 USCA section 371 of the revised Code, instead of to section 88 of the earlier compilation. This error is repeated in the caption of the latter indictment proper.

ferred to as "the Corporation", "being then a corporation in which the United States . . . . was a stockholder", certain claims upon the Corporation, "knowing said claim(s) to be false, fictitious and fraudulent".

Appearing as paragraph A of Count One, the statement of which the foregoing is the gist, is repeated, by reference, in each of the succeeding counts, of which there are sixteen in all. Each claim forms the basis of a separate count. Paragraph B of each count gives the details relating to each of the claims, respectively, which were presented on various dates in 1943. The details are not relevant to the legal questions now being considered. Each claim is alleged to be a "Secondary Handler's Statement of wool purchases" in which the defendant certified that he paid certain named persons certain sums greater than those that he actually paid.

In No. 10,759, there are 15 counts, each count dealing with a different claim presented to the Corporation in 1946.

In No. 10,767, Count 1 charges a conspiracy to make false, fictitious, and fraudulent claims upon the Corporation in connection with purchases made by the Sacramento Wool Company, hereinafter referred to as "the wool company", as a secondary handler under the rules and regulations of the Secretary of Agriculture, by setting forth falsely in certain statements, known as "Second-

ary Handler's Statements", that purchases of wool had been made from persons in certain amounts and weights and for certain prices. Three overt acts are alleged, each act consisting of a Secondary Handler's statement covering several wool purchases from certain named persons, all three such statements having been presented at Sacramento, California, to Milton S. Theller, as a "primary wool handler", by the defendants on dates ranging from April 30, 1946, to April 15, 1947, inclusive. Only the named defendants Clavere and Kennedy are charged with having taken part in the conspiracy alleged in Count 1, although "divers other persons whose names are to the Grand Jurors unknown" are also alleged to have taken part.

In Count 2 of No. 10,767, all three defendants named in the indictment are charged with conspiring with each other and with other unnamed persons to present fraudulent claims upon the Corporation in connection with purchases made by the wool company as a secondary handler by setting forth falsely in certain statements, etc., that purchases of wool had been made from persons in certain amounts, etc. Four overt acts are alleged to have been committed between September 23, 1946, and November 14, 1946, inclusive, involving either a Secondary Handler's Statement made and presented to Theller by the defendants Clavere and Kennedy, or checks issued by the defendant Kennedy, one of which was endorsed by the defendant Shapiro.

2. The Motions to Dismiss

In each of the three cases, motions to dismiss were filed by the respective defendants. Although several grounds were urged in support of each motion, only one need be here considered; namely, that the indictments were not found within three years next after the crimes therein alleged had been committed.

3. The Pertinent Statutes

The False Claims Statute, as it stood at the time that the offenses charged in the three indictments are alleged to have been committed, is found in Title 18 of the 1946 edition of the United States Code, and reads as follows:

> "*Section 80. (Criminal Code, section 35(a).) Presenting false claims.*
>
> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or

conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

In the same title of the same edition of the United States Code there was to be found the following conspiracy statute:

"*Section 88.. (Criminal Code, section 37.) Conspiring to commit offense against the United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

And finally, there was Section 590a of the same Title, reading as follows:

"Suspension of limitations on offenses involving the defrauding of the United States.

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of World War II, or with any disposition or termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1614, 1615-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts,

offenses, or transactions which are already barred by provisions of existing law."

The successor of Section 590a, *supra,* is Section 3287 of Title 18 of the 1948 revision of the United States Code, and reads as follows:

"*Wartime suspensions of limitations.*

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

"Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section."

4. The Questions Presented

It is conceded that prosecution is barred by the three-year statute of limitations, 18 USC section 582 (1946 ed.), unless the running of this statute has been "tolled" by the operation of the Wartime Suspension of Limitations Act of 1942, Section 590a of Title 18 of the same edition of the Code, *supra*, or its successor, 18 USCA section 3287, *supra*. The defendants contend that (1) The Suspension Act does not apply to any offenses arising under the statutes upon which the indictments are based, the False Claims Statute and the General Conspiracy Statute, *supra;* (2) even if the Act applied, in terms to the offenses charged, the suspension was lifted on September 1, 1948, the date the repeal of Section 590a, *supra*, became effective, and accordingly prosecution was barred "at the latest" on September 1, 1951; and (3) even if the Suspension Act applied to the offenses charged and the suspension survived the repeal of Section 590a by the Act of 1948, prosecution of the offenses was barred after December 31, 1949, three years after the proclamation terminating hostilities.

The crucial question, however, may be further narrowed down to the following:

Before the Wartime Suspension of Limitations Act, *supra*, can be invoked, must the statute under which the indictment is brought spell out in so many words—or, as the Supreme Court has expressed the same thought in this precise connec-

tion, "denominate"—*fraud against the United States?*

5. Before the Wartime Suspension of Limitations Act Can Be Relied Upon, the Statute Under Which the Indictment Is Brought Must in So Many Words Specify "Fraud" Against the United States.

A number of the cases cited by the defendants in support of their contention that the statute under which an indictment is brought must specify "fraud against the United States" before the Wartime Suspension of Limitations Act becomes applicable, may be distinguished from the cases at bar because the decisions were expounding statutes different from those applicable to the indictments now before this Court. There is, however, a residuum of Supreme Court opinions that cannot be thus brushed aside.

In *United States* v. *Scharton*, 285 U. S. 518, 522 (1932), the indictment was under section 1114(b) of the Revenue Act of 1926 (Internal Revenue Acts, 26 USCA section 1114(b), page 325), which read in part as follows:

> "Any . . . person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof shall . . . be guilty of a felony . . ."

The applicable statute of limitations was found in Section 1110(a) of the Act (18 USCA section 585 (1927 ed.); and was as follows:

> "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, in any manner, the period of limitation shall be six years, . . ."

Despite the fact that it was a part of the very statute under which the indictment was brought, the proviso was held not to apply because fraud against the United States or any agency thereof was not an ingredient of the offense charged. The Court pointed out that the proviso was an excepting clause and therefore was to be strictly construed. The section under which the charge was laid made an attempt to evade any tax under the Revenue Act of 1926 an offense *without the mention of fraud*. In the False Claims Statute, which this Court is here considering, there is likewise no mention of fraud against the United States. And assuredly, there is at least as much *actual* fraud committed against the United States in "evading or defeating" a Federal tax as there is in certifying in a Secondary Handler's Statement that one has paid certain named persons certain sums greater than those that he actually paid:

In the *Scharton* case, the Supreme Court closed its opinion in words that are peculiarly applicable here:

> "And, as the (limitations) section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so *denominated* by the statutes creating offenses. (Cases cited) The purpose of the proviso is to apply the six-year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.' (Case cited)." (Emphasis supplied)

This Court is convinced that when the Supreme Court, in the above passage, referred to "cases", it was not confining its fraud shibboleth to internal revenue cases, but to indictments under *any* statute "in which defrauding or an attempt to defraud the United States is an ingredient". Only as to indictments of *that* general type can the Wartime Suspension of Limitations Act be invoked.

In *Marzani v. United States*, C.A. D.C., 168 F. 2d 133, 136 (1948), the Court had before it the precise two statutes involved in the instant cases—the False Claims Act and the Wartime Suspension of Limitations Act. There the Court flatly held that "the Suspension Act does not apply to offenses under the False Claims Act". That case was twice

affirmed by an equally divided Supreme Court, 335 U. S. 895 (1948) and 336 U. S. 922 (1949).

The question seems to have been put beyond cavil by the Supreme Court in *United States* v. *Beacon Brass Co.*, decided on November 10, 1952. There a one-count indictment was returned against the corporation and its president and treasurer, charging that, in violation of Section 145(b) of the Internal Revenue Code, 26 USC section 145(b), they had willfully attempted to evade taxes by making false statements to Treasury representatives on October 24, 1945, for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return . . . for the fiscal period ending October 31, 1944, filed on or about January 5, 1945."

Section 145(b) provides in part:

> "(A)ny person who willfully attempts *in any manner* to evade or defeat any tax imposed by this chapter or the payment thereof, shall, *in addition to other penalties provided by law*, be guilty of a felony . . ." (Emphasis supplied by the Supreme Court)

The indictment was returned on March 6, 1951. The six-year limitation period, 26 USC section 3748(a)(2), applicable to offenses under this statute, had expired on a charge for filing a false tax return in January, 1945, but it had not expired

on a charge of making false statements to Treasury employees in October, 1945. The District Court viewed the indictment as charging the separate crimes of filing a false return and making subsequent false statements to Treasury representatives, and dismissed the indictment as duplicitous.

On September 14, 1951, a second indictment was returned against the defendants, repeating the charge that in violation of Section 145(b) they "did willfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the said corporation . . . by making certain false and fraudulent statements and representations, at a hearing and conference before representatives and employees of the United States Treasury Department, on or about October 24, 1945 . . ." Reference to allegedly false return filed in January, 1945, was omitted, and instead it was charged that the false statements were made "for the purpose of concealing additional unreported net income . . ."

The passage in the Supreme Court's opinion of particular application here is the following, appearing on Page 2 of the slip opinion, since it refers to another clause of the very statute that is now being considered by this Court:

> "Section 35(A) of the Criminal Code, 18 USC section 80 (1946 ed.) (now 18 USC (Supp. V) section 1001) makes it unlawful to 'knowingly and willfully . . . make . . . any false or fraudulent statements or representa-

> tions . . . in any matter within the jurisdiction of any departmnet or agency of the United States . . .' *Obviously,* at the times of the indictments here, the *three-year* limitation period, 18 USC (Supp. V) section 3282, *for violations of this statute* had expired as to statements made in October, 1945." (Emphasis supplied)

In other words, in this very recent opinion, the Supreme Court of the United States has regarded it as "obvious" that the ordinary three-year period of limitation should apply to a case coming under the False Claims Statute, instead of the extended period provided for by the Wartime Suspension of Limitations Act.[2]

This Court is aware that, in *United States* v. *Gilliland,* 312 U. S. 521, 522 (1941), the Supreme Court, in construing Section 80, said:

> "The amendment (of 1934) indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."

That case, however, did not involve a statute of limitations, which *Scharton* has reminded us "is to

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[2] See also *United States* v. *Obermeier,* 2 Cir., 186 F. 2d 243, 257 (1950), certiorari denied, 340 U. S. 951 (1951); *United States* v. *Shoso Nii,* DC Hawaii, 96 F. Supp. 971, 972-973 (1951).

be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses." Furthermore, we have just seen that, in a case that did involve a statute of "repose" as well as Section 80, the Supreme Court has held that the *three*-year limitation period should apply. This Court is likewise cognizant of the fact that, in an amended opinion in *Bridges* v. *United States,* handed down on November 18, 1952, the Court of Appeals for the Ninth *Circuit held that, in order for the Suspension Act to apply,* it was not necessary that "fraud" should "be spelled out literally in the statute" under which the charge is laid. Slip opinion, page 16. It should be observed, however, that in its *Bridges* opinion our appellate court did not evaluate the force of the word "denominated" in the *Scharton* case; that, in criticizing the "conclusions" of the Court of Appeals for the District of Columbia in the *Marzani* case, *supra,* the Ninth Court of Appeals did not consider the fact that *Marzani* had twice been affirmed, though by a divided Supreme Court; and finally, our Court of Appeals apparently overlooked the *Beacon Brass* case, *supra.*

This Court, therefore, must though reluctantly, disregard the holding in *Bridges,* and be guided by the Supreme Court's recent semaphores in *Scharton, Marzani,* and *Beacon Brass.*

6. Conclusion

Accordingly, the Court holds that, as to all three indictments, the three-year statute of limitations fixed by 18 USC section 582 and its successor, 18 USC section 3282, applies. Because the statute that the various defendants are charged with having violated or with having conspired to violate does not "denominate" the acts proscribed therein as "frauds", or does not, *in so many words,* have as an "ingredient" a "defrauding or an attempt to defraud the United States", neither the Wartime Suspension of Limitations Act of 1942 nor its successor of 1948 can apply.

All three motions to dismiss are granted, and all three indictments are dismissed.

Dated: December 5th, 1952.

DAL M. LEMMON
United States District Judge

Brief for the U.S.

Nos. 634 635 636

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Nos. 634, 635, 636

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

LESTER E. GRAINGER

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH C. CLAVERE AND WILLIAM G. KENNEDY

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH C. CLAVERE, WILLIAM G. KENNEDY AND A. L. SHAPIRO

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 634

UNITED STATES OF AMERICA, APPELLANT

v.

LESTER E. GRAINGER

No. 635

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH C. CLAVERE AND WILLIAM G. KENNEDY

No. 636

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH C. CLAVERE, WILLIAM G. KENNEDY AND A. L. SHAPIRO

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 23-31) is not reported.

JURISDICTION

The order of the District Court dismissing the indictments was entered December 5, 1952 (R. 31-32). Notices of appeal were filed on January 2, 1953 (R. 32-33). On April 6, 1953, this Court noted probable jurisdiction (R. 37). The jurisdiction of this Court to review on direct appeal the orders of the District Court dismissing the indictment, where such dismissal is based on a construction of the statute on which the indictment is founded, is conferred by 18 U. S. C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the offense of wilfully making a false, fictitious or fraudulent claim for payment, to a corporation in which the United States was a stockholder, involved fraud within the purview of the Wartime Suspension of Limitations Act, which suspended the running of any statute of limitations applicable to offenses involving fraud against the United States.

STATUTES INVOLVED

Section 35(A) of the Criminal Code, which was in effect at the time of the offenses involved in the indictments (35 Stat. 1095, as amended, 18 U.S.C. (1946 ed.) 80), provided in relevant part:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States

SUPREME COURT, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 634

UNITED STATES OF AMERICA,
Appellant,

vs.

LESTER E. GRAINGER,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

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of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.[1]

Section 1 of the Act of August 24, 1942, c. 555, 56 Stat. 747, as amended by Section 19(b) of the Act of July 1, 1944, 58 Stat. 667, and by Section 28 of the Surplus Property Act of 1944, 58 Stat. 781 (18 U.S.C. (1946 ed.) 590a), now revised as permanent legislation (18 U.S.C. (1948 rev.) 3287, *infra*), commonly known as the Wartime Suspension of Limitations Act, provided in pertinent part in 1945, when the offenses involved herein were alleged to have been committed:

[1] Repealed and reenacted in substantially the same terms, although in separate provisions, as 18 U.S.C. (1948 rev.), 287 and 1001.

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *

18 U.S.C. (1948 rev.) 3287, which became effective on September 1, 1948, and was in effect on May 20 and June 27, 1952, the dates of the return of the indictments herein, provides in pertinent part:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.[2]

STATEMENT

These cases involve three indictments, filed May 20 and June 27, 1952 (R. 1-14). The indictment in No. 634 charges the appellee Grainger, and that in No. 635 charges the appellees, Clavere and Kennedy, with having, at various times during 1945, "unlawfully, knowingly, willfully and fraudulently" presented for payment to the Commodity

[2] The President proclaimed the termination of hostilities on December 31, 1946. 12 F.R. 1.

Credit Corporation, "being then a corporation in which the United States * * * was a stockholder," certain claims upon the Corporation, "knowing said claims[s] to be false, fictitious and fraudulent" in violation of the False Claims Act. The claims in question were certifications by the appellees to the Commodity Credit Corporation, representing that the defendants had paid higher prices for the purchase of wool than were actually paid by them (R. 1-10).[3]

The third indictment, that involved in No. 636, charges a conspiracy to commit offenses against the United States by making false, fictitious and fraudulent claims upon the Commodity Credit Corporation as outlined above. One of the two counts in this indictment charges the appellees, Clavere and Kennedy, with such conspiracy, with overt acts on dates from April 30, 1946, to April 15, 1947. The other count charged the appellees, Clavere, Kennedy, and Shapiro, with overt acts on dates from September 23, 1946, to November 14, 1946 (R. 10-14).

All of the appellees moved to dismiss the indictments, principally on the ground that the prosecutions were barred by the statute of limitations.[4] It

[3] In addition, some of the counts against the appellees Clavere and Kennedy, in No. 635, charge that those appellees made some claims as to wool stated to have been purchased on certain occasions when, in fact, no wool at all had been purchased on those occasions (R. 6-8, 10).

[4] It was also urged that the acts set forth in the indictment did not constitute offenses against the laws of the United States, and that it could not be ascertained from the indictments what sort of claims appellees had made against the Corporation (R. 14-22).

was urged that the Wartime Suspension of Limitations Act, *supra*, was not applicable, but that if it ever was, it was made inapplicable by its repeal on September 1, 1948; and if it was not made inapplicable by that repeal, still, the prosecutions were barred because they were not commenced by December 31, 1949, three years after the proclamation of termination of hostilities (R. 14-22).

The District Court granted the motions to dismiss, holding that the Suspension Act did not apply to toll the running of the otherwise applicable three-year period of limitations because the False Claims Act does not "denominate" the proscribed acts as "frauds" (R. 23-31).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the offense of wilfully and fraudulently making and presenting false claims for payment to the Commodity Credit Corporation, a corporation in which the United States was a stockholder, does not involve fraud against the United States within the meaning of the Wartime Suspension of Limitations Act.

2. In holding that the offense of conspiring to commit the offense against the United States of wilfully and fraudulently making and presenting false claims for payment to the Commodity Credit Corporation, a corporation in which the United States was a stockholder, does not involve fraud against the United States within the meaning of the Wartime Suspension of Limitations Act.

3. In dismissing the indictments.

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SUMMARY OF ARGUMENT

The Suspension of Limitations Act, which in time of war suspends the running of the applicable statutes of limitations with respect to offenses involving fraud against the United States, applies to the offense here involved, violation of the False Claims Act, since fraud against the United States is an essential element of the crime as defined by Congress. *United States* v. *Neweck*, 271 U.S. 201. Cases under the same section of the Criminal Code, but brought under the provisions dealing with *false statements* as distinguished from the provisions dealing with *false claims* are not in point here. *Marzani* v. *United States*, 168 F. 2d 133 (C.A. D.C.) affirmed, 335 U.S. 895, 336 U.S. 922. Although false statements have been held in some cases not to involve fraud on the ground they do not necessarily involve pecuniary fraud, here under the false claims provision the fraud is necessarily a pecuniary one. The court below misinterpreted *United States* v. *Scharton*, 285 U.S. 518, as requiring that the statute use the very words of the Suspension Act in order to fall within its provisions. *Scharton* has never before been held to require such a result and it is not reasonable to believe that this Court so intended. This is precisely the type of offense Congress wished to save from going unpunished because of preoccupation with the prosecution of war.

ARGUMENT

Since the offenses involved in these cases were all committed more than three years prior to the indictments, prosecution is barred by the three-year limitation provision of 18 U.S.C. (1946 ed.) 582,

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unless they fall within the terms of the Wartime Suspension of Limitations Act, 18 U.S.C. (1946 ed.) 590a.[5] The applicability of that Act to these cases depends on whether the offenses with which appellees are charged are offenses "involving fraud * * * against the United States."[6]

In determining whether an offense involves fraud, this Court has held that fraud must be one of the essential elements of the crime as set forth in the statute, and that it will not suffice that fraud is involved in the particular acts which are alleged in the indictment as constituting a violation of the statute. *United States* v. *Noveck*, 271 U. S. 201. Stated another way, the crime must be so described in the statute that in order for an indictment thereunder to be sufficient it must allege acts which constitute fraud against the United States. Thus in

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[5] The terms of this statute are set forth *supra*, pp. 3-4. It has been revised, but without any change in substance and may now be found at 3287, set forth *supra*, p. 4.

[6] Since the indictments were found more than three years subsequent to the termination of hostilities on December 31, 1946 (12 F.R. 1), the issue of whether the Suspension Act suspends the "running" of the statute of limitations until three years after the war, or merely extends its term for the period of hostilities, could have been passed upon by the court below. That is the particular issue which is pending before this Court in *United States* v. *Klinger*, No. 527, this Term. However, the court below did not even advert to this issue as a basis for granting the motions to dismiss and therefore the question is not open for consideration on this appeal. In *United States* v. *Borden Co.*, 308 U.S. 188, this Court stated at 207:

> For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction.

the *Noveck* case, while it was alleged that the defendant had filed a false income tax return for the purpose of defrauding the United States, the statutory offense involved was perjury which, although it involved fraud against the United States under the facts of the particular case, does not include fraud against the United States as one of its elements. Similarly in the present case it is not enough that the particular indictments contain allegations that the acts of the defendants were fraudulent; in order for the Suspension Act to apply, it must be demonstrated that the indictments would not have charged violations of the statutory provision involved had they not alleged fraudulent acts.

Criminal liability under the False Claims Act depends on a showing that the defendant presented for "payment or approval" a "claim upon or against the Government * * * knowing such claim to be false, fictitious, or fraudulent * * *." 18 U. S. C. (1946 ed.) 80. This offense involves a fraud, and it is labelled a fraud. Surely, it would be the sheerest mechanical literalism to contend that a knowingly false claim is not a fraud unless the word "fraud" alone or in the conjunctive, rather than the disjunctive coupled with "false" and "fictitious," is used in the definition. It is perhaps possible for a claim to be fraudulent without being false or fictitious; but it is certainly not possible for a claim to be knowingly false or knowingly fictitious without being fraudulent.[7]

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[7] Since the suspension statute is applicable to offenses involving defrauding the United States "whether by conspiracy

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 6314

UNITED STATES OF AMERICA,
Appellant,

vs.

LESTER E. GRAINGER,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

OPINIONS BELOW.

The opinion and order of the District Court was filed on December 5, 1952. Neither the opinion nor order are reported. (R. 23-31.)

JURISDICTION.

The order of the District Court dismissing the indictment was entered December 5, 1952. (R. 31-32.)

Fraud is defined as "a false representation of a matter of fact * * * which deceives and is intended to deceive another * * *." Webster's *New International Dictionary* (2d Ed., 1934) 1003.[8] It is plain, therefore, that as a matter of simple, common-sense meaning to say "to make a knowingly false claim against" is to say "to defraud." The Court of Appeals for the Second Circuit, in construing a suspension statute, similar to the one here involved, with respect to a charge of embezzling funds of the United States, met the argument that the embezzlement statute did not involve fraud because the correct words were not used, in *Weinhandler* v. *United States*, 20 F. 2d 359 at 361, certiorari denied, 275 U. S. 554, by quoting this Court's statement in *Grin* v. *Shine*, 187 U.S. 181, at 189:

> As the word "embezzled" itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word "fraudulent" would not enlarge or restrict its signification. Indeed, it is impossible for a person to embezzle the money of another without committing a fraud upon him.[9]

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or not," the decision in No. 636, involving conspiracy to commit the offenses substantively charged in the other indictments, is clearly governed by the same considerations which govern cases 634 and 635.

[8] Cf. *Knauer* v. *United States*, 328 U.S. 654, 657: "Fraud connotes perjury, falsification, concealment, misrepresentation." See also Black's *Law Dictionary* (3d ed.) p. 813: "Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury."

[9] It is to be noted that the same judge who decided the instant case has also held that the Suspension Act does not

The court below erroneously relied upon *Marzani* v. *United States*, 168 F. 2d 133 (C.A. D.C.), affirmed and reaffirmed by an equally divided court, 335 U.S. 895, 336 U.S. 922, as supporting its conclusion. However, the basic holding in that case, with which we take issue in *Bridges* v. *United States*, No. 548, this Term, but which is not at all involved here, is that the kind of fraud referred to in the Suspension Act must involve a pecuniary or proprietary loss to the United States. The offense in *Marzani* was the making of false statements by a government employee with respect to membership in subversive organizations. Here no similar issue is involved since the very purpose of the misrepresentations made illegal by the false claims statute is to collect money from the Government to which the claimant is not entitled. This is indeed fraud in the "primary sense." See *United States* v. *Cohn*, 270 U.S. 339, 346.

The offense in *Marzani* was charged under the portion of Section 35A of the old Criminal Code, *supra*, pp. 2-3, which made false statements, rather than false claims, illegal. The court below specifically recognized that the section includes two offenses (R. 23), but failed to appreciate that the false statements provision need not involve a pecuniary fraud while the false claims provision must. Thus that case and the others cited by the court below, which relate to false statements which

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apply to an offense under the embezzlement statute for the same reason he held the act inapplicable to the False Claims Act. *United States* v. *Berman* (N.D. Calif., March, 1953), appeal noted.

may or may not involve pecuniary frauds, have no application to the present case.[10]

The decision of the court below appears to place primary reliance on *United States* v. *Scharton*, 285 U.S. 518, a case in which this Court held that a suspension provision of the Internal Revenue Code, similar to the suspension act here involved, did not apply to the offense of willfully attempting in any manner to evade or defeat any tax imposed by the Act. The court below read that decision as holding that "in so many words" the statute must "denominate" the proscribed acts as "frauds" (R. 28). The court found this meaning in the following statement (285 U.S. at 522):

> And as the [limitations] section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. * * * The purpose of the proviso is to apply the six year period to cases "in which defrauding or an attempt

[10] Similarly, false statements, but not necessarily false claims, are encompassed by the offense involved in *United States* v. *Obermeier*, 186 F. 2d 243 (C.A. 2), certiorari denied, 340 U.S. 951 (false statements under oath in a naturalization case). *United States* v. *Beacon Brass Co.*, 344 U.S. 43, so far as applicable here, also involved a false statement in an income tax return. The indictment there involved a willful attempt to evade taxes under Section 145(b) of the Internal Revenue Code—an alleged attempt which was probably also a violation of former Section 35(A) of the Criminal Code. In upholding the indictment, the Court observed that the three-year statute of limitations applicable to offenses under Section 35(A) had run (344 U.S. at 45). But the possibility that the statute had been tolled by the suspension statute was neither raised nor presented for decision in that case.

to defraud the United States is an ingredient under the statute defining the offense." * * *

We suggest that this Court used this language to express the views it had earlier stated in *United States* v. *Noveck*, 271 U. S. 201, and *United States* v. *McElvain*, 272 U.S. 633, briefly, that the statutory description of the offense must include fraud as an essential element. It does not appear reasonable that the Court was suggesting that some precise shibboleth be found in each statute. Cf. *Grin* v. *Shine*, 187 U.S. 181. Certainly, no other court has interpreted the *Scharton* case in the manner adopted by the court below. See *Marzani* v. *United States*, 168 F. 2d 133, 135 (C.A. D.C.), affirmed and reaffirmed, 335 U.S. 895, 336 U.S. 922; *United States* v. *Obermeier*, 186 F. 2d 243, 256 (C.A. 2), certiorari denied, 340 U.S. 951; *Bridges* v. *United States*, 199 F. 2d 811, 823 (C.A. 9), certiorari granted March 9, 1953. In other words what this Court was saying in *Scharton* was that there are other ways to "evade or defeat" a Federal tax than by the use of fraud.[11]

Finally, the interpretation of the Suspension Act adopted by the court below, cuts the very heart from the statute. An examination of the pro-

[11] It is possible that the Court gave the suspension of limitations provision in the Internal Revenue Act a narrower construction than it would have given a more general suspension provision since, when Congress sought to distinguish between offenses involving fraud and offenses not involving fraud in tax cases, it must have had in mind something different from merely "cheating" the government since it is the nature of violations of internal revenue laws to deprive the government of taxes due it.

visions of the Criminal Code which presumably Congress had in mind, namely the offenses set forth in Chapter 15, entitled "Claims and Services in Matters Affecting Government" and in Chapter 47, "Fraud and False Statements," indicates that in the view of the court below few if any of them "in so many words" define the crimes by "denominating" the proscribed acts as "frauds against the United States." Instead of protecting the United States against concealed cheating and falsification not promptly discovered by reason of preoccupation with winning a war, the effect of the Act would be limited indeed.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below dismissing the instant indictments be reversed and the causes remanded to the District Court for further proceedings on the indictment.

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APRIL, 1953.

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BRIEF FOR APPELLEE

No.

634

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Notice of appeal was filed by the United States on January 2, 1953. (R. 32-33.) Probable jurisdiction was noted by this Court on April 6, 1953. (R. 37.) The jurisdiction of this Court to review on direct appeals the decisions of the District Courts sustaining, prior to the attachment of jeopardy, the appellee's pleas in bar to the indictments is conferred by 18 U.S.C. 3731. See also Rules 37 (a) (2) and 45 (a), F. R. Crim. P.

THE PERTINENT STATUTES INVOLVED.

The False Claims Statute as same was written at the time that the offenses charged in the indictment against the appellee, is found in Title 18 of the 1946 Edition of the United States Code and contains the following:

> *"Section 80. (Criminal Code, section 35 (a).) Presenting false claims.*
>
> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any

trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."[1]

Section 590a of the same Title reads as follows:

"*Suspension of limitations on offenses involving the defrauding of the United States.*

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of World War II, or with any disposition or termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1614, 1615-1646 of Appendix to Title 50, shall be suspended until

[1]Repealed and reenacted as 18 U.S.C. (1948 rev.) 287, 1001.

three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

A successor statute to Section 590a was later passed and is Section 3287 of Title 18 and is found in the 1948 revision of the United States Code, as follows:

"*Wartime suspension of limitations.*

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section."

The history and purpose of the Suspension Statute is set forth in *United States v. Smith,* 342 U.S. 225, 227.

STATEMENT.

Appellee, Lester E. Grainger, was indicted by the Grand Jury for the District Court of the United States, Northern District of California, Northern Division on the 20th day of May, 1952 and charged with sixteen counts of filing false claims during the year 1945 upon the Commodity Credit Corporation, a government corporation. (R. 1-5.) After arraignment appellee filed his motion to dismiss stating, among other grounds, "The indictment was not found within three (3) years next after the alleged offenses were committed." (R. 14.). Upon this ground alone the Court dismissed the indictment and the appeal here presented was taken by the Government. (R. 31-32.)

QUESTIONS PRESENTED.

Before the Wartime Suspension of Limitations Act (18 U.S.C. 590a) can be invoked must the statute under which the indictment is brought denominate fraud against the United States?

SUMMARY OF ARGUMENT.

The Wartime Suspension of Limitations Act does not apply in the case such as the one at bar where the intent to defraud is not an essential ingredient of the statute defining the offense.

ARGUMENT.

The indictment in the instant action charges the offense against the accused, as follows:

"*The Grand Jury charges:*

Count One:

A. That at the time hereinafter mentioned Lester E. Grainger (hereinafter called 'said defendant'), at Stockton, in the County of San Joaquin, within the Northern District of California, Northern Division, did unlawfully, knowingly, wilfully and fraudulently make and cause to be made, present and cause to be presented for payment and approval to and by the Commodity Credit Corporation, being then a corporation in which the United States of America was a stockholder, a claim upon the said Commodity Credit Corporation, hereinafter more particularly described, knowing said claim to be false, fictitious and fraudulent in the manner hereinafter set forth;

B. That said claim was presented on or about May 28, 1945; that said claim is more particularly described as a Secondary Handler's Statement of wool purchases; that in said claim said defendant certified that he paid J. C. Esmond, Wallace, California, $502.08 for 1046 pounds of wool at the

SUPREME COURT, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

Nos. 635, 636

UNITED STATES OF AMERICA,
Appellant,
vs.
JOSEPH C. CLAVERE and WILLIAM G. KENNEDY,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
vs.
JOSEPH C. CLAVERE, WILLIAM G. KENNEDY and A. L. SHAPIRO,
Appellees.

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

rate of .48¢ per pound; whereas in truth and in fact as defendant then and there well knew, he had paid J. C. Esmond $470.70 for said wool at the rate of .45¢ per pound." (R. 1.)

This is repeated in substance through fifteen other counts. (R. 1-5.)

By the Government's appeal, the question again comes before this Court as it did in *Marzani v. United States*, 168 F. 2d 133, affirmed without opinion by this Honorable Court, 335 U.S. 895, and affirmed after rehearing, 336 U.S. 922, as to whether or not the normal three-year statute of limitations is tolled by the first clause of 18 U.S.C. Section 582, or its successor, 18 U.S.C. 3287, in a prosecution under 18 U.S.C. 80 which involves only the making of false claims upon the Commodity Credit Corporation, *where neither purpose to defraud the United States or the Commodity Credit Corporation nor pecuniary loss to the United States or the said Corporation is an ingredient of the offense and is not alleged.* There is no question but that the prosecution would be untimely if it were not for the Wartime Suspension Limitations Act, supra. It is the position of appellee that before the Wartime Suspension Limitations Act, supra, can come into play, that the offense charged must "denominate" fraud against the United States or a corporation in which it is a stockholder. See *United States v. Scharton*, 285 U.S. 518.

In the last cited case the defendant was indicted under Section 1114(b) of the Revenue Act of 1926 which reads in part, as follows:

> "Any * * * person who wilfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall * * * be guilty of a felony * * *"

The limitations statute applicable in that action was found in Section 1110(a) of the Act (18 U.S.C.A. Section 585 (1927 Edition)), and read thus:

> "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided,* That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, in any manner, the period of limitation shall be six years, * * *"

Notwithstanding the fact that it was not an integral part of the very Act under which the indictment was there founded, the proviso was held not to apply because *fraud against the United States was not an ingredient of the offense charged.* In that opinion this Honorable Court took occasion to comment that the proviso was an excepting clause and as such was to be strictly construed. The section under which the indictment was founded in said case made an attempt to evade any tax under the Revenue Act of 1926, an offense *without the mention of fraud.* In the action at bar the statute under consideration, to wit, *the False Claims Statute, also makes no mention*

of fraud against the United States. It certainly follows, as pointed out by Judge Lemmon in his opinion dismissing the indictments in the Court below "there *is at least as much actual fraud committed against the United States in 'evading or defeating' a Federal tax as there is in certifying in a Secondary Handler's Statement that one has paid certain named persons certain sums greater than those that he actually paid:*". (R. 28.)

Mr. Justice Roberts in writing the opinion in the *Scharton* case closed with the comment that statutes of limitations must be *"liberally interpreted in favor of respose"*, and that the suspending proviso should not be *"extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."* These much quoted words must certainly be applied in ruling on the instant question. It has been the time honored opinion of this Court that the Suspension Statute can only apply to indictments under any statute "in which defrauding or an attempt to defraud the United States is an ingredient." In no decision of this Court do we find an exception to the rule although the question has ofttimes been presented to it for consideration. The precise question here involved is not new to this Court since twice before in the case of *Marzani v. U. S.*, supra, has this Court had occasion to consider the very point here argued. Mr. Justice Prettyman, in writing the opinion in that case for the District of Columbia Circuit Court of Appeals, stated at page 135 of 168 F. 2d, as

follows: *"The question before us is whether the Suspension Act applies to offenses under the False Claims Act."*

That is the very question here involved. In the opinion of the Appellate Court, twice affirmed by this Court, it was held unequivocally that "the Suspension Act does not apply to offenses under the False Claims Act". This is clear and concise and there should be no argument on the subject, however, the Government has seen fit to continue to prosecute despite the ruling in the *Marzani* case.

As recent as November 10, 1952 this Court gave its opinion in the case of *United States v. Beacon Brass Company,* 73 S. Ct. 77, 78, where our conclusion from a reading of this opinion is that the normal three-year statute of limitations applies to an indictment under the False Claims Act instead of the additional period given by the Suspension Statute. See also *United States v. Obermeier,* 2 Cir. 186 F. 2d 243 at 257 (1950), certiorari denied, 340 U.S. 951 (1951); *United States v. Shoso Nii, D.C. Hawaii,* 96 F. Supp. 971, 972-973 (1951).

In *United States v. McElvain,* 272 U.S. 633, this Court ruled that the six year statute of limitations involved in the case of *United States v. Noveck,* 271 U.S. 201 did not apply to conspiracy to defraud the United States by making a false income tax return. Since Congress in enacting the Wartime Suspension Limitations Act of August 25, 1942, as amended, employed the essential language of its predecessor stat-

utes of 1921 and 1926 it is presumed, under well established rules of statutory construction, that it adopted the construction of that language given by the Supreme Court in cases involving the 1921 and 1926 provisions. *Apex Hosiery Company v. Leader*, 310 U.S. 469, 488, 489; *United States v. Ryan*, 284 U.S. 167, 175.

In *United States v. Obermeier*, 186 F. 2d 243 (2d Cir.), the Suspension Act as it now reads, was held, by Judge Frank, speaking for the Circuit Court of Appeals for the Second Circuit, to suspend a statute of limitations "only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense' and does not, absent a statutory definition, apply to perjury or false swearing, even when the United States is directly interested."

It is respectfully submitted that the Suspension Act applies only where both the intent to defraud and pecuniary or property loss to the United States are essential ingredients under the statute defining the offense.

With respect to the intent to defraud as an essential ingredient, the opinions of this Court in *United States v. Novick*, *United States v. McElvain* and *United States v. Scharton*, set forth above, are decisive. This Court in these cases has rejected the contention that fraud or the intent to defraud is implicit in such crimes as perjury and wilful attempt to defraud the payment of a tax by false returns.

In these cases, this Court has held that statutes extending statutes of limitations in cases involving fraud will not be allowed to be used to create new classes of crimes involving fraud, unless clearly so intended and it has refused to find such an intent in the provisos of 1921 and 1926. On the contrary, this Court has ruled that such provisos, which in terms are identical with the Suspension Act here involved, are not to be extended by construction to embrace frauds not so designated by the statutes creating the substantive offenses.[2]

The statute under which appellee was indicted (18 U.S.C. 80 now 18 U.S.C. 287 and 1001 (1948 Rev.)) provides that anyone who, within the jurisdiction of any Government department, makes any false or fraudulent statement or representation knowing the same to contain any false or fraudulent statement, shall be punished. *Intent to defraud is neither set forth nor can the same be implied.* This is apparent, it is submitted, from a reading of the very *next* section of the United States Code (Sec. 1002) which makes it a crime for one "knowingly and *with intent to defraud* the United States, or any agency thereof

---

[2]Where the intent to defraud was an essential ingredient of the crime charged the six-year period of limitations contained in the provisos have been held applicable. For example, see *Bailey v. United States*, 13 F. 2d 325 (9th Cir.), wherein the Court held that defrauding the United States was a statutory ingredient of the offense of uttering forged endorsements to a government check with intent to defraud. In *Weihandler v. United States*, 20 F. 2d 359 (2d Cir.), fraud was held to be an essential element of the crime of embezzlement. See also *Falter v. United States*, 23 F. 2d 420 (2d Cir.) (cert. denied 277 U.S. 590).

(to) possess any false * * * writing * * * for the purpose of enabling another to obtain money from the United States." (See also, 18 U.S.C. § 1003: "whoever knowingly and fraudulently demands etc."

Section 1001 of Title 18, United States Code, is derived from the second clause of Section 80 of Title 18, as amended in 1934, 48 Stat. 996. The legislative history of the 1934 amendment to Section 80 shows that while Congress first sought to include the words "with intent to defraud" and later to retain "defrauding" as an essential element in the offense, the amendment as finally enacted (and as it now appears in Sec. 1001) rejected this attempt and framed the statute on a different basis. This legislative history is summarized in *United States v. Gilliland*, 312 U.S. 86, 93-4, where the application of the second clause of Section 80 was sustained as to an indictment charging false and fraudulent statements in a matter within the jurisdiction of a department of the United States, where no with "intent to defraud" was alleged.[3] In this respect the following language of the Court is pertinent:

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[3]The *Gilliland* case, it should be noted, did not involve the question of extending the period of limitations, did not construe the word "defrauding" as used in the 1921 or 1926 provisos and did not refer to the *Noveck* and *Scharton* cases. It had nothing to do with the interpretation of any statute suspending or extending a statute of limitations. The only issue with which the court was concerned related to a proper interpretation of the second clause of Section 80, Title 18, United States Code, as amended, in which as appears from the text above, the term "defraud" does not appear. It cannot be urged, therefore, that the *Gilliland* case in any way affects or limits the rule established by this Court in the *Noveck* and *Scharton* cases.

"The amendment eliminated the words 'cheating and swindling' and broadened the provisions so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations when these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described * * *

"Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Sec. 9 (c) of the National Industrial Recovery Act of (June 16) 1933 with respect to the transportation of 'hot oil'. The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had (for the presentation of false papers.) The bill which was passed by Congress, however, was amended in its final status so as to require 'intent to defraud the United States.'[4] This bill was

[4]For the text of this bill, see H.R. 8046, 73rd Cong., 2d Sess., which provides as follows: "* * * That every person who with intent to defraud the United States knowingly or wilfully makes or aids or assists in the making, or who with such intent in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, statement, certificate, voucher, or paper or

returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill. 78 Congressional Record, pt 6, p. 6778 (73rd Cong. 2nd sess.). Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to 'hot oil'. A bill was then passed and approved which included, with other amendments of Sec. 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused.[5] The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the

writing purporting to be such, concerning or pertaining to any application, bond, bid, loan or payment thereof, or concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States or any corporation owned or controlled by the United States in whole or in part, shall be punished * * *."

[5]In reporting out this bill the Committee of Judiciary of the House stated "the rights of the accused are protected by the provision that the act must be committed wilfully and knowingly and with intent to defraud the United States." (H. Rept. No. 829 to accompany H.R. 8046.)

The bill (H.R. 8912) which was resubmitted after the President's veto, contained the original language of clause 2 of Section 80, "with the intent of cheating and swindling or defrauding the government of the United States" (H. Rept. No. 1463, May 3, 1934, to accompany H.R. 8912) and passed the House in this form (78 Cong. Rec. pt. 6, pp. 8136-37). This bill, however, was amended in the Senate (S. Rept. 1202, May 28, 1934, 78 Cong. Rec. pt. 6, pp. 9790, 11270, 73 Cong. 2d Sess.) and, as finally enacted, omitted not only "cheating and swindling" but also "or defrauding the government of the United States" (ibid, p. 11270).

purpose 'of reaching a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith'."

In light of the legislative history of the amendment, the construction of the statute as it existed prior to the amendment, in *United States v. Cohn*, 270 U.S. 339, the purpose of the amendment to reach false papers, and the elimination of the words "with intent to defraud" and "defrauding" from the bill as finally enacted, it is submitted that, as this Court stated of the perjury statute in the *Noveck* case and of the Revenue Act in the *Scharton* case, both *supra*, the purpose to defraud the United States is not an element of the crime defined in Section 1001. Intent to defraud does not affect the charge, it need not be proved, and it may be rejected as mere surplusage. The *Gilliland* case, *supra*, itself, conclusively establishes that intent to defraud is not an essential ingredient of the offense.[6] See also *United States v.*

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[6]It cannot be argued, as the Government attempted to do in *Marzani v. United States*, *supra*, that although the 1934 amendment to Section 80 of Title 18, United States Code (the predecessor of and identical with Section 1001, Title 18, here involved) eliminated as an element of the offense the phrase "for the purpose and with the intent * * * *of defrauding the United States*," the concept of an intent to defraud was retained by the 1934 amendment by providing that such statement must be made knowingly and wilfully. In the first place, the words "knowingly and wilfully" were not substituted for the intent formerly required before the amendment of 1934, as those words were in the original Act of 1918 and were carried over to the 1934 amendment. Moreover, the word "wilful" generally means no more than that the person charged with a duty knows what he is doing. It is not a substitute for or the equivalent of intent to defraud. *See Evans v. United States*, 153 U.S. 584, 587-592; *United States v. Scharton*, 285 U.S. 518; *Fields v. United States*, 82 U.S. App. D.C. 354, 357, 164 F. (2d) 97. Furthermore,

Mellon, 96 F. (2d) 462, cert. den. 304 U.S. 586; *United States v. Presser,* 99 F. (2d) 819; *United States v. Goldsmith,* 108 F. (2d) 917, cert. den. 309 U.S. 678; *Ex Parte Berkhoff,* 65 Fed. Supp. 976, 979, 159 F. (2d) 6; *United States v. Zavala,* 139 F. (2d) 830, 831.

It has been otherwise held that intent to defraud the United States is not an essential element, under false and fraudulent statutes, which in essential respects are identical with Section 1001 of Title 18. In *United States v. Van Lewuven,* 62 F. 69, 70 (D.C. Iowa, 1894), involving a statute making it a crime for one to "knowingly or wilfully make or aid or assist in the making * * * of any false or fraudulent affidavit * * * concerning any claim for pension * * * or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior" (R.S. Sec. 4746, July 7, 1898, 30 Stat. 718; see 18 U.S.C.A. § 81 (now superseded by 18 U.S.C.A. § 289)) and which statute, like the one in the present case, did not include the words "defrauding" or "with intent to defraud," a demurrer to the indictment was overruled in the following language:

> "* * * if the indictment was based upon the provisions of Sections 5418, 5421, or 5479 of the Re-

even if it may be assumed that the words "knowingly and wilfully" could in a given case mean that a person acts with a bad purpose and with intent to break the law, it will be difficult to hold that the meaning of such words in a statute from which "intent to defraud" was stricken intentionally, operates to restore to such statute the very intent which Congress eliminated. Compare 18 U.S.C. § 1003, in which Congress expressly used the words "whoever knowingly and fraudulently" rather than the words "whoever knowingly and wilfully".

vised Statutes (U.S.C. Title 18, §§ 72, 73), the failure to aver the intent or purpose of defrauding the United States would probably be fatal to the indictment as these sections are alike in the provision that the acts named therein must be done with the purpose of defrauding the United States; and under the ruling of the Supreme Court of the United States in *U. S. v. Staats,* 8 How. 40-45, the purpose to defraud the United States is one of the essentials in the definition of the crime. I do not understand, however, that the indictment in question is based upon either one of these sections, but upon the provisions of Section 4746 which declares that 'every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions * * * shall be punished, etc.' The gist of this offense is not in an effort to defraud the United States but it consists in knowingly procuring the making of a false or fraudulent affidavit concerning a claim for pension or payment thereof, or any other matter within the jurisdiction of the Commissioner of Pensions. The statute does not in terms make an intent or purpose to defraud the United States an element in the offense and the facts necessary to fully make out the crime can be averred without charging the intent to defraud the United States."

See also *United States v. Hansee,* 79 F. 303 (C.C.N.Y. 1897), in which it was stated that no intent to defraud under this statute was required and an offense was

committed if a person knowingly and wilfully procured the presentment of a false or frauduient affidavit in support even of a just claim.

The legislative history on the Suspension Statute has been collected and set forth in the appendix of the Brief for the Petitioners in *Bridges, et al. v. United States, No. 548,* this term (pp. 11-27). Rather than to repeat same, we call the Court's attention to this collection of data and reports which we submit substantiates the arguments herein set forth.

CONCLUSION.

It is respectfully submitted, therefore, for the reasons hereinabove set forth, that the order of the District Court dismissing the indictment should be affirmed for the reason that the Suspension Statute is not applicable to the instant action, and that the normal Suspension Statute, to-wit, 18 *U.S.C.* 3282, the three year statute, is applicable, and, therefore, the filing of the indictment was not timely.

Dated, Stockton, California,
April 20, 1953.

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BRIEF FOR APPELLEES

Nos.

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States v. Kapp (1937) 302 U.S. 214.[2] Obviously, the statute, the construction of which is in controversy herein, is not the statute underlying the indictments, but the 1942 wartime suspension of limitations act as amended, 18 USC Section 590a (1946 ed.), enacted as an exception to the applicable statute of limitations.

In support of their contention that the indictments herein were barred by the statute of limitations, appellees in the Court below relied upon three points of law which are also urged herein, to-wit:

(1) The wartime suspension of limitations act, 18 USC 590a (1946 ed.), did not, in terms, apply to the offenses charged;

(2) Even if the act did apply, the suspension was lifted by the repeal of Section 590a, effective on September 1, 1948 so that prosecution was barred on September 1, 1951; and

(3) If the act applied, and the suspension was not lifted by the 1948 repeal, still, the prosecutions were barred because they were not commenced by December 31, 1949, three years after the declared termination of hostilities.

(See: Opinion and Order, paragraph 4, entitled "The Questions Presented", Record 27.)

[2] In that case a demurrer was sustained to an indictment charging a conspiracy to violate the false claim statute. (Criminal Code, Section 35, 18 USC Section 80.) It was held that, for the purpose of determining the jurisdiction of the Federal Supreme Court upon appeal by the Government under 8 USC Section 682, the false claim statute, not the statute relating to conspiracies to commit an offense against or to defraud the United States (Criminal Code, Section 37, 18 USC Section 88) would be regarded as the statute upon which the indictment was founded, even though the point was made that the indictment charged a conspiracy under Section 37 of the Criminal Code.

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underlying statute as a whole and not by reference to the particular clause or provision thereof involved in the indictment. If the statute can be violated without the commission of a pecuniary fraud, the Suspension Act does not apply..... 37

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In the Supreme Court
OF THE
United States

October Term, 1952

Nos. 635, 636

United States of America,	*Appellant,*
vs.	
Joseph C. Clavere and William G. Kennedy,	*Appellees.*
United States of America,	*Appellant,*
vs.	
Joseph C. Clavere, William G. Kennedy and A. L. Shapiro,	*Appellees.*

On Appeals from the United States District Court for the Northern District of California.

BRIEF FOR APPELLEES.

OPINIONS BELOW.

The opinions of the District Court (R. 23-31) is not reported.

JURISDICTION.

Pursuant to appellees' motion duly made in the Court below, the indictments herein were dismissed upon the ground that they were barred by the three-year statute of limitations, 18 USC Section 582 (1946 ed.) and 18 USC 3282 (Record 31). Technically, it is the latter section which is applicable.

The Government, in setting forth the jurisdictional basis of the appeal, erroneously refers to the statutory provision governing appeals from orders of the District Court "dismissing indictments where such dismissal is based on the construction of the *statute on which the* indictment is founded." (Government Brief, p. 2). The statute, or statutes, upon which the indictments herein are founded are the false claims statutes, 18 USC Section 80 (1946 ed.) and the general conspiracy statute, 18 USC Section 88 (1946 ed.). At no stage of these proceedings did any of the parties hereto raise any question as to the construction or validity of either of the statutes "upon which the indictment is founded". The questions presented herein relate exclusively to the 1942 Wartime Suspension of Limitations Act as Amended, 18 USC 590(a) (1946 ed.), the savings clause in the Act of June 25, 1948 by which Section 590(a) was repealed and the effect of these provisions upon the applicability to the indictments herein of the three-year limitations statute, 18 USC 3282.

It follows that the statutory provision governing the Court's jurisdiction on this appeal is not the clause dealing with decisions "based upon the inva-

lidity or construction of the statute upon which the indictment or information is founded" but the following clause of 18 USC Section 3731, to-wit:

> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

QUESTION PRESENTED.

The question presented is whether appellees' motion in bar can be sustained. That question turns upon whether the indictments herein are barred by the three-year statute of limitations of 18 USC Section 582 (1946 ed.), or its successor, 18 USC Section 3282, the provisions of the Wartime Suspension of Limitations Act, 18 USC Section 590(a) (1946 ed.) notwithstanding.

In support of their motion, appellees in the Court below urged (1) that the Act was inapplicable; and (2) that even if applicable, the Act did not operate to extend the statute of limitations to the date of the indictments, or June 27, 1952. Thus, the sufficiency of appellees' motion depends upon two major points of law, the second of which may be further subdivided into two issues, one concerning the effect of the 1948 repeal of 18 USC Section 590(a), the other having to do with the meaning of the term "running" as used in the Suspension Act. The Government erroneously designates as the question presented on this appeal, not the sufficiency of appellees' motion, but one of the points of law involved therein, to-wit, the

applicability of the Suspension Act, upon the ground that the Court below decided the motion upon that point. (Government Brief, p. 2 and Footnote 6, p. 8.)

STATUTES INVOLVED.

The principal statutes involved in this appeal are the False Claims Statute, 18 USC Section 80 (1946 ed.) and the 1942 Wartime Suspension of Limitations Act as amended 18 USC Section 590(a) (1946 ed.). These statutes (including the legislative history of the Suspension Act) and the other statutes involved in this appeal are set forth in paragraph 1 of the Appendix.

STATEMENT.

Appellees agree substantially with the statement of the case by the Government. Two points, it is believed, require amplification:

1. The allegations in the indictments.

The Government makes the point that the violations of the false claims statute charged herein are framed in terms of the false claims clause rather than in terms of the false statement clause which was involved in *Marzani v. United States* (U.S. App. D.C.; 1948), 168 F. (2d) 193 (Government Brief, 11). It should be pointed out that as to Indictment No. 10759 (Record 6-10), the various counts allege the presentation for payment and approval of certain claims to

the Commodity Credit Corporation by appellees with knowledge that said claims were false, fictitious, and fraudulent. However, as charged in the indictments, the claims were false, fictitious and fraudulent only by reason of certain false or fraudulent statements therein made, to-wit: that appellees either had paid higher prices for the purchase of wool than were actually paid or that appellees purchased wool on certain occasions when in fact no wool had been purchased on such occasions.[1] See Government brief pp. 4-5. In its brief (pp. 4-5) the Government presents Indictment No. 10759 in Case No. 635 and Indictment No. 10767 in Case No. 636 as alleging identical substantive offenses. This is not quite correct. The allegations in Indictment No. 10767 (Record 10-11) charging conspiracies punishable under the general conspiracy statute are even more clearly to the effect that the gist of the substantive offense charged is the making of *false statements*. Thus, Count 1 alleges that defendants conspired to commit offenses against the United States of America, to-wit: "to make false, fictitious and fraudulent claims * * * *by setting forth*

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[1] Using Count 1 of Indictment 10759 (Record 6) as an example, it is alleged that the defendants knew "said claim to be false, fictitious and fraudulent *in the manner hereinafter set forth:*"

> "That said claim was made on or about November 14, 1946; that said claim is more particularly described as a Secondary Handler's Statement of wool purchases on which said defendant certified that they had paid James Harley, Yuba City, California, $915.88 for 2043½ pounds of wool; whereas in truth and in fact as defendants then and there well knew they had purchased no wool."

The form and substance of the allegation is that the false and fraudulent character of the claim presented consisted *solely* in the false representation that the defendant had *on a certain occasion* purchased wool for a stated price.

falsely in certain statements known as 'Secondary Handler's Statements' that purchases of wool had been made from persons in certain amounts and weights and for certain prices."

2. The ground upon which the indictments herein were dismissed.

In order to clarify the jurisdictional basis of this appeal, appellees desire to direct the Court's attention to certain portions of the opinion and order of the Court below, relating to the ground upon which the Court dismissed the indictments.

In paragraph 2 of its opinion and order, entitled "Motions to Dismiss" the Court below stated that only one ground for the motion to dismiss need be considered, namely, "that the indictments were not found within three years next after the crimes therein alleged had been committed." (Record 24-25.)

In reviewing the contentions of the appellees, the court below stated (paragraph 4, opinion and order, entitled "Questions Presented", Record 27):

> "The defendants contend that (1) The Suspension Act does not apply to any offenses arising under the statutes upon which the indictments are based, the False Claims Statute and the General Conspiracy Statute, supra; (2) even if the Act applied, in terms to the offenses charged, the suspension was lifted on September 1, 1948, the date the repeal of Section 590a, supra, became effective, and accordingly, prosecution was barred 'at the latest' on September 1, 1951; and (3) even if the Suspension Act applied to the offenses charged and the suspension survived the repeal of Section 590a by the Act of 1948, prosecution

of the offenses was barred after December 31, 1949 three years after the proclamation terminating hostilities."

Finally, in paragraph 6 of the opinion entitled "Conclusion", the Court below stated, unequivocally, that it held "that as to all three indictments, the three-year statute of limitations fixed by 18 USC Section 582 and its successor, 18 USC Section 3282 applies".

SUMMARY OF ARGUMENT.

I. The Court has jurisdiction to consider any and all of the three points of law urged by appellees below, which determine whether the indictments herein were or were not barred by the applicable three-year limitations statute, 18 USC 582 (1946 ed.) or its successor, 18 USC 3282. The Government's contention that the issue related to the *operation* of the suspension act (as distinct from its *applicability*) is not open for consideration, cannot be sustained upon the terms of the applicable clause of the Criminal Appeals Act, 18 USC Section 3731 or the decisions construing it.

II. The 1942 Wartime Suspension of Limitations Act is inapplicable to the offenses charged herein.

(A) The Act or its World War I predecessor has been interpreted by the Courts to require fraud against or upon the United States as a necessary *element or ingredient* of the crime as defined in the statute creating the offense.

(B) The suspension act is aimed at frauds in the "usual and primary sense" of the term, meaning pecuniary frauds involving a pecuniary or proprietary loss to the United States. A violation of the false claims clause of the false claims statute, does not, under the terms of the statute or under the allegations contained in the indictments herein, necessarily involve a pecuniary or proprietary loss to the United States.

(C) The suspension act applies only to frauds arising from, or related to, the Government's war program. The acts charged herein relate to permanent administrative programs of the Government, having no connection with the war emergency.

(D) The pertinent decisions of this Court require than an offense, to come within the terms of the suspension act (or its World War I predecessor) be denominated a fraud under the terms of the statute creating the offense. The offenses herein charged are not denominated as frauds. Contrary to the Government's contention, the exclusion of the false claims statute from the scope of the suspension act does not emasculate or render meaningless the provisions of the act.

(E) The applicability of the suspension act to an alleged offense is determined by reference to the underlying statute as a whole and not by reference to the particular clause or provision thereof involved in the indictment. If the statute can be violated without the commission of a pecuniary fraud, the suspension act does not apply. It is settled that the false claims statute can be violated by making false statements not

involving a pecuniary fraud. *Marzani v. United States* (U. S. App. D. C. 1948) 168 F. (2d) 193 and *United States v. Tomasello* (CCA-2), 160 F. (2d) 348. Accordingly, the suspension act is not applicable to *any* offense arising under the false claims statute. *United States v. Beacon Brass Company* (1952) 344 U.S. 43.

III. Even if the suspension act, 18 USC 590a (1946 ed.) in terms, applied to the offenses charged herein, the suspension was lifted on September 1, 1948, the date the repeal of the statute became effective. Accordingly, prosecution was, at the latest, barred on September 1, 1951. The Act of June 25, 1948, 62 Stat. 683, which revised the Criminal Code, repealed Section 590a. The act also reenacted as 18 USC Section 3287 a provision substantially identical with the repealed section. The suspension operative under Section 590a was not preserved by the savings clause of the Act of June 25, 1948 nor by any other applicable savings clause in force at the time of the repeal. *United States v. Obermeier* (CCA-2; 1950) 186 F. (2d) 243; *cert.* den., 340 U.S. 951.

IV. Even if the suspension act applied to the offenses charged and the suspension survived the repeal of 18 USC Section 590a in 1948, under the proper construction of the act, prosecution of the alleged offenses was barred after December 31, 1949 three years after the proclamation terminating hostilities.

(A) Under the decision of this Court in *United States v. Smith* (1952) 342 U.S. 225, the suspension

act, where applicable, operated to extend existing periods of limitation to, but not beyond, December 31, 1949, three years after the declared termination of hostilities. The decision of this Court in *United States v. Beacon Brass Co.* (1952) 344 U.S. 43, is in accord. The decisions are construable to mean that the suspension period ended on December 31, 1949, displaced or superseded any limitations period provided by the general statute of limitations. A more authoritative interpretation of the Supreme Court's decisions and of the suspension act is found in *United States v. Klinger* (CCA-2; 1952) 199 F. (2d) 645, which decision is now being reviewed in Case No. 527, this Term. In that decision, Judge Learned Hand construed the "running" of the applicable limitations statute to mean the "bar of the statute". Accordingly, the suspension act operated to suspend the bar or *the expiration* of any applicable statute of limitations to December 31, 1949.

(B) Judge Learned Hand's construction is in harmony with the legislative purpose of the suspension act which was to insure that the Government had three years following the declared termination of hostilities within which to dispose of the entire accumulation of wartime frauds.

(C) Judge Learned Hand's construction of the critical clause is one which adheres to the accepted meaning of the statutory language according to normal usage.

(D) The construction urged by appellees and based upon Judge Learned Hand's opinion, when

tested by projected results, effectuates the purpose of the suspension act and, at the same time, preserves the beneficial policy of the statute of limitations. This fundamental policy of the law would be subverted by the construction of the act urged by the Government.

ARGUMENT.

It is conceded that since the offenses involved were all committed more than three years prior to the return of the indictments, prosecution is barred by the three-year limitations provision of 18 USC Section 582 (1946 ed.) or its successor, 18 USC Section 3282 except for the operation of the wartime suspension of limitations act, 18 USC Section 590a or its successor 18 USC Section 3287. Prosecution of the alleged offenses would not be barred if and only if, (1) the suspension act applied, in terms, to the statutory offenses charged; *and* (2) the suspension act operated to extend the limitations period to or beyond June 27, 1952, the date of the filing of the indictments. The Government's statement that prosecution of the offenses is barred "unless they fall within the terms of the wartime suspension act, 18 USC (1946 ed.) 590a" is obviously erroneous in that it ignores the second condition which attaches to the immunity of the indictments from the bar of the limitations statute. Of course, if this Court held the suspension act inapplicable as did the Court below, consideration of the second point would not be necessary.

I. THE SINGLE QUESTION PRESENTED FOR REVIEW ON THIS APPEAL IS WHETHER APPELLEES' MOTION IN BAR GRANTED IN THE COURT BELOW CAN BE SUSTAINED. THE COURT IS NOT LIMITED, IN REVIEWING THE SUFFICIENCY OF THE MOTION, TO A CONSIDERATION OF THE PRECISE POINT OF LAW UPON WHICH THE DECISION OF THE DISTRICT COURT WAS BASED.

The District Court's holding and decision in the instant cases was "that, as to all three indictments [Nos. 634, 635 and 636], the three-year statute of limitations fixed by 18 USC Section 582 and its successor, 18 USC Section 3282, applies". Upon this ground, appellees' motion to dismiss was granted and all three indictments were dismissed. (See: Opinion and Order, paragraph 6 entitled "Conclusion", Record 31.)

The Government's appeal to this Court has been taken under that clause of 18 USC Section 3731 which provides for direct appeals: "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

In its "Statement as to Jurisdiction" (p. 2), the Government relied upon the quoted clause as the basis of jurisdiction. In its brief, however, the Government erroneously refers to the clause of the statute governing appeals from decisions based upon the invalidity or construction of the "*statute upon which the indictment is founded.*" (Government Brief p. 2.) The statute upon which all indictments herein are founded, including the one involving alleged conspiracies punishable under the general conspiracy statute, is the false claims statute 18 USC Section 80 (1946 ed.). *United*

Point (3), it will be recognized, is the precise issu pending before this Court in *United States v. Klinger* No. 527, this Term, wherein the Government seek review of the decision of the Court of Appeals for th Second Circuit in *United States v. Klinger* (CCA-2 1952) 199 F. (2d) 645.

The Court below, in its opinion and order, carefull reviewed the first point of law urged by appellee to-wit, the applicability of the suspension act. Sinc the Court concluded that the act was inapplicable, i was not necessary to accord a similarly detailed re view to the other two points urged by appellees. I cannot be said, however, as the Government claims that "the Court below did not even advert to thi issue as a basis for granting the motions to dismiss." The Court stated as its *holding* that the three yea limitations statute applied. While it discussed onl one point of law extensively, it expressed awarenes of the other points. (Record 27.) Moreover, it relie strongly upon *United States v. Beacon Brass Co* (1952), 344 U.S. 43, wherein this Court more probabl passed upon point (3) the issue in the *Klinger* case than upon point (1), the applicability of the suspen sion act, as is more fully explained in Section IV A(1 of this brief (pp. 47-48 below).

But, even if the District Court, in sustaining ap pellee's motion in bar, had based its decision onl upon the inapplicability of the suspension act, it doe not follow that the other two points urged by appellee in support of their motion are not open for considera tion on this appeal.

There is nothing in the words of the statutory clause governing this appeal, nor in its purposes which warrants such a restriction of the Court's review. The Government relies upon *United States v. Borden Co.* (1939) 308 U.S. 188. In that case, the Court, at the opening of its opinion, reviewed the principles governing direct appeals based upon "the construction of the statute *upon which the indictment is founded*" and so far as here pertinent, stated as follows (at p. 193):

> "When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider *other objections to the indictment*. The Government's appeal does not open the whole case." (Emphasis supplied.)

Later, in the opinion, the Court, summarizing its conclusions, stated (at pp. 206-207):

> "Fifth. Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider *other objections to the indictment* or questions which may arise upon the trial with respect to the merits of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction."

In its brief (p. 8, footnote 6), the Government confines itself to a quotation of the last sentence which,

divorced from the context, especially from the statement of principles at the opening of the opinion, is hardly apt to express the true rule enunciated by the Court.

While, in appellees' view, the opinion of the *Borden Co.* case does not in every case involving the construction of the "underlying statute", limit the Supreme Court's review to the *particular* construction adopted by the District Court, the limitation, even if it existed, has been formulated only with reference to appeals based upon the construction of the statute *upon which the indictment is founded.* The limitation is patently inapplicable to an appeal involving, as this appeal does, the construction of what is, in effect, a statute of limitations provision or an exception thereto.

As we read the decision in *United States v. Borden Co., supra,* the Court held that, once having examined the question upon which the appeal is grounded (such as the construction of the underlying statute),[3] it will not consider any *other* or *independent* objection to the indictment. The soundness of this principle can hardly be questioned since, under any other rule, the Supreme Court's jurisdiction in direct appeals (which

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[3]It might well be that as used in the Criminal Appeals Act, the term "construction" of the underlying statute, means the "particular construction" adopted by the District Court so that the question forming the basis of jurisdiction is the propriety of "*that* construction". On the other hand, where the basis of the appeal is the invalidity of a statute or the sufficency of a motion in bar, no similar limitation of the appealable question can be derived from the language of the Act. Accordingly, in *United States v. Curtiss-Wright Corp.* (1936), 299 U. S. 304, this Court held that the scope of its review extended to all points "which also challenged the validity of the statute * * *".

is exceptional in character),[4] might easily transcend the statutory limits. This principle has, however, no application to an appeal such as this where the several points urged by the appellees all relate to the *same* ground or question which forms the statutory basis of the Court's jurisdiction, for there could be, in that case, no unwarranted extension of the Court's appellate function beyond the terms of the statute. The point is illustrated by the Court's decision in *United States v. Curtiss-Wright Corp.* (1936) 299 U.S. 304, in which this Court distinguished the *Borden Co.* case essentially upon the basis indicated. While appellees are not aware of any decision exactly in point, it is submitted that this appeal is governed by the principles of *United States v. Curtiss-Wright Corp., supra.*

In the foregoing case, the Government's appeal was from an adverse judgment sustaining a demurrer to an indictment based upon the invalidity of the underlying statute. Appellees in the Court below had assigned several points as justification for an attack upon the validity of the statute. The District Court sustained the demurrer upon one of the points, but overruled it as to others. Upon appeal, the Supreme Court concluded that the judgment could not be sustained upon the point assigned by the District Court. Rejecting the Government's argument that the points unsuccessfully urged below were not open for consideration, the Supreme Court held that it was at liberty to

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[4] "The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States v. Borden Co.* (1939), 308 U. S. 188, 192.

inquire into any of the rejected grounds which *also challenged the validity of the statute* and were thus within the scope of review. Said the Court (at pp. 329-330):

> "The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since in that case the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the grounds alleged. The judgment of the lower court is that the statute is invalid. *Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act.*" (Emphasis supplied.)

There is a close analogy between this case and the cited case. The question on this appeal concerning the

validity of the *indictment* that is, whether it is or is not barred by the statute of limitations, corresponds to the question of the validity of the *statute* involved in an appeal directed to that question. The fact that in the cases at bar, the District Court (as the Government contends, but appellees deny), took no position upon the alternative points, whereas in the cited case, the alternative grounds were rejected, appears of no significance one way or another. But the crucial similarity of the two cases is that in each the alternative points urged by appellees were, or are, directed to the single question which represents the statutory ground of this Court's jurisdiction. For, as we read the decision in *United States v. Curtiss-Wright Corp., supra,* the Court held that the scope of review, in direct appeals, extends to *all points* relating to *the precise question upon which the appeal, under the pertinent clause of the Criminal Appeals Act, is founded,* whether that question be the invalidity of the statute or, as in the instant case, the invalidity of the indictment as being barred by the statute of limitations.

The inapplicability herein of the principle of the *Borden Co.* case and, conversely, the applicability of the decision in *United States v. Curtiss-Wright, supra,* becomes apparent almost with a statement of the problem. There is no dispute that the Court below stated as its "holding" that the three-year limitation statute 18 USC Section 582 (1946 ed.), or its successor 18 USC 3282, applied to the indictments herein. (See: *Opinion and Order,* paragraph 6 entitled "Conclusion", Record 31.) The District Court held, in other

words, that the indictments were barred by the three-year limitations statute. Upon that ground alone, the Court granted appellees' motion to dismiss which was both in form and substance a "motion in bar."[5]

Where, as in the instant case, an appeal is taken from a decision sustaining a motion in bar, the only question before the Court is *whether the motion in bar can be sustained. United States v. Kissel* (1910) 218 U.S. 601, 606. Stated another way, the precise question presented on this appeal is whether, as the District Court held, the indictments herein are barred by the three-year limitations statute, 18 USC Section 582 (1946 ed.) or 18 USC Section 3282. If the bar of the statute applies, the motion can be sustained, otherwise the lower Court's decision granting it must be reversed.

The indictments are not barred and appellees' motion cannot be sustained if and *only* if: (1) the suspension act is applicable to toll the statute of limitations *and* (2) the suspension act operated to extend the limitations period to June 27, 1952, the date the indictments were filed. The Government, on the other

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[5]In determining whether a decision sustaining a motion in bar is within the meaning of the Criminal Appeals Act, the Supreme Court is not concluded by the particular former designation of the pleadings, or by the order made thereon, or the propriety of either. The Court looks to substance and not to form. *United States v. Hark* (1944), 320 U. S. 531, 536. Thus, it has been held immaterial that the plea was erroneously designated as a plea in abatement or that the ruling took the form of granting motions to dismiss or to quash which were, in substance, motions in bar. *United States v. Barber* (1911), 219 U. S. 72, 78; *United States v. Goldman* (1928), 277 U. S. 229, 236-237, and *U. S. v. Hark, supra.*

hand, erroneously assumes that the validity of the indictment depends *solely* upon the applicability of the act. (Government's brief pp. 7-8.) Proceeding from that assumption, the Government invokes the principle of the *Borden Co.* case to bar consideration of the second point of law involved in the sufficiency of the motion *as though it was an independent objection to the indictment* and not part and parcel of the very question which is the subject and jurisdictional foundation of the appeal. The fallacy of the Government's position is thus apparent on its face.

The issue concerning the *operation* (as distinct from the *applicability*), of the suspension act, may be divided into two separate questions of law. First, there is the question as to whether the repeal of the wartime suspension of limitations act, 18 USC Section 590a (1946 ed.), by the Act of June 25, 1948 had the effect of lifting the suspension on September 1, 1948, the effective date of the repealing act. In that event, the prosecution of the offenses would be barred on September 1, 1951. Secondly, there is the issue as to whether the suspension act operated to postpone until December 31, 1949 (three years after the termination of hostilities), the *commencement* of the applicable limitations period, or its *expiration*, (referred to, also, as the "bar of the statute"). Under the latter construction of the act, prosecution of any offense coming within the terms of the wartime suspension act was barred after December 31, 1949 rather than after December 31, 1952 as the Government contends in *United States v. Klinger*, No. 527, this Term.

The Government argues that the issue presented in the *Klinger* case, though admittedly involved in this appeal, is not open for consideration. Appellees believe they have shown that there is no basis in the statute or in the decisions for the Government's position. Neither is there a basis in reason or justice. For, if the issue should be decided adversely to the Government in *United States v. Klinger, supra* (which is set for hearing at the same time as the instant appeal) a remand of this case will be a perfunctory, if not futile act since the Court below will be bound by this Court's controlling decision in the *Klinger* case. If, on the other hand, the issue were resolved in favor of the United States, no legitimate interest of the Government would be infringed by the consideration of the point.

Based upon the foregoing, it is submitted that this Court has jurisdiction to review the sufficiency of appellee's motion in bar upon any and all three points of law advanced in the Court below.

II. THE SUSPENSION ACT DOES NOT, IN TERMS, APPLY TO ANY OF THE STATUTORY OFFENSES CHARGED IN THE INDICTMENTS HEREIN.

The applicability of the suspension act depends on whether the statutory offenses with which appellees are charged, are offenses involving fraud against, or a defrauding of, the United States within the meaning of the act. The offenses charged in cases 634 and 635 are violations of the false claims act, 18 USC

Section 80 (1946 ed.) while those involved in case No. 636 are violations of the general conspiracy statute, 18 USC Section 88 (1946 ed.). Inasmuch as the conspiracy charges in case No. 636 merely involve an alleged conspiracy to commit offenses substantively charged in case No. 635, the Government concedes that "the decision in Case No. 636 * * * is clearly governed by the same considerations which govern cases 634 and 635." (Government brief, footnote 7.)

A. The Suspension Act does not apply unless the statutory definition denominates the offense a fraud or makes fraud an essential element of the crime.

The Government recognizes that to come within the terms of the suspension act under pertinent rulings of this Court, an offense must embody fraud as an essential element or ingredient under the statute defining such offense; and that "it will not suffice that fraud is involved in the particular acts which are alleged in the indictment as constituting a violation of the statute. *United States v. Noveck* (1926) 271 U.S. 201." The Government concludes that "similarly in the present case, it is not enough that the particular indictments contain allegations that the acts of the defendants were fraudulent * * *." (Government brief, pp. 8-9.)

The gist of the pertinent decisions of this Court is that the suspension act (actually a predecessor identical in terms) does not apply unless the statutory definition of the offense charged expressly "denominates" it as a fraud or makes fraud an essential element or ingredient thereof which the Government

must charge and prove to sustain an indictment and conviction under the statute creating the offense. *United States v. Noveck, supra; United States v. McElvain* (1926), 272 U.S. 633; *United States v. Scharton* (1932) 285 U.S. 518. Stated another way, the crime must be so described in the statute that an indictment thereunder failing to allege fraud would be defective or demurrable. *United States v. Scharton, supra.*[6]

B. The Suspension Act applies only to frauds involving a pecuniary or proprietary loss to the United States. A violation of the false claims clause of the false claims statute as charged in the indictment does not embody such pecuniary fraud as a necessary element.

It is submitted that the basic fallacy in the Government's argument concerning the applicability of the suspension act to the indictments herein may be traced to the following statements in the Government's brief:

> "Criminal liability under the False Claims Act depends on a showing that the defendant presented for 'payment or approval' a 'claim upon or against the Government * * * knowing such claim to be false, fictitious or fraudulent * * *.'[7]) 18 U.S.C. (1946 ed.) 80. This offense involves a fraud, and it is labelled a fraud."
>
> (Government Brief, p. 9.)

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[6]Where the Court (at page 521) pointed out that there are numerous statutes "expressly making intent to defraud an element of a specified offense * * * under which an indictment failing to aver that intent would be defective".

[7]The Government's assumption is, obviously, erroneous, since criminal liability under the false claims act may be incurred by a violation of the false statement clause, as well as by a violation of the false claims clause.

> "Fraud is defined as 'a false representation of a matter of fact * * * which deceives and is intended to deceive another * * *.' Webster's *New International Dictionary* (2d Ed., 1934) 1003. It is plain therefore that as a matter of simple, commonsense meaning to say 'to make a knowingly false claim against' is to say 'to defraud.'"
>
> (Government Brief, p. 10.)

The Government contends that the acts alleged in the indictment are framed in terms of what is known as the false claims clause rather than the false statement clause of the false claims statute.[8] (Government brief pp. 10-11.) As will be shown hereafter, an analysis of the allegations contained in the indictment proves this contention to be of questionable validity. In any event, the Government further contends that, pursuant to the dictionary definition of the term, the alleged presentation of a false claim necessarily involves a fraud. Needless to say, in determining whether fraud within the meaning of the suspension act is involved, we must consult the pertinent decisions, not the dictionary. If the making of a false representation which deceives and is intended to deceive, were the touchstone of fraud within the meaning of the act, then perjury on an income tax return required to be filed under federal statute, the making of a false income tax return, an attempt to evade taxes, the making of false or fraudulent statements to Government officers in violation of the *false statement clause* of the

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[8]The Government claims that violations of the false claims clause and of the false statement clause are separate offenses.

false claims statute or in violation of the Nationality Code would all constitute frauds within the meaning of the suspension act, contrary to the unequivocal rulings of this Court and of the Courts of Appeals for the District of Columbia and for the Second Circuit, respectively, in *United States v. Noveck, supra, United States v. McElvain, supra, United States v. Scharton, supra, Marzani v. United States* (U.S. App. D.C., 1948) 168 F. (2d) 193, affirmed 335 U.S. 895 and reaffirmed on rehearing in 336 U.S. 922 and *United States v. Obermeier* (CCA-2, 1950) 186 F. (2d) 243, *cert.* den. 71 S.Ct. 569.

In *United States v. Cohn* (1926) 270 U.S. 339, this Court, in construing the false claims act *prior* to its amendment in 1934 (48 Stat. 996) declared (at pp. 346-347) that in its "usual and primary sense" the word "defrauding" meant "cheating the Government out of property or money". This Court declined to give the term its broader "secondary" or "administrative" meaning of "interfering with or obstructing * * * lawful government functions by deceitful or fraudulent means" except as a result of the 1934 broadening amendment which removed the words "* * * for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States" from Section 35 of the Criminal Code. *United States v. Gilliland* (1941) 312 U.S. 86; cf. *Haas v. Henkel* (1910) 216 U.S. 462.

There is nothing in the context or the legislative history of the wartime suspension of limitations act which warrants interpreting the words "defrauding

or attempts to defraud the United States * * * or any agency thereof" other than in their usual and primary sense. The language of the suspension act is narrower than that of Section 37 of the Criminal Code which was construed in *Haas v. Henkel, supra.*[9] The legislative history as revealed in the House and Senate Committee Reports makes it clear that pecuniary frauds arising from the Government's "gigantic war program" were the exclusive target of the act. (See Appendix, paragraph No. 2.) And, in *Marzani v. United States, supra,* twice affirmed by an equally divided Court, 335 U.S. 895 and 336 U.S. 922, it was held specifically that the 1942 suspension act "does not apply to offenses in which defrauding the United States in a pecuniary way is not an essential ingredient". (168 F. (2d) at 136.)

While challenging the ruling in the *Marzani* case, the Government argues primarily that the decision has no application to offenses under the false claims statute which are based upon alleged violations of the false claims clause: The false statement provision, the Government contends, need not involve a pecuniary fraud while a violation of the false claims clause must. (Government's brief, p. 11.)

Does the "wilful and fraudulent" making or presentation for payment and approval of a claim upon

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[9]Section 37 of the Criminal Code, or its successor, 18 USC Section 88 (1946 ed.), covers the defrauding of the United States "for any purpose", indicating that the purpose need not be pecuniary. This language is omitted from the 1942 Suspension Act as well as from the 1921 and 1926 provisos construed in the *Noveck, McElvain* and *Scharton* cases.

a Government agency by a person "knowing said claim to be false, fictitious and fraudulent" as defined in the statute and charged in indictment No. 10759, Case No. 635 (Record 6-10) *necessarily* involve (as the Government phrases the test) "a pecuniary or proprietary loss to the United States"?[10]

According to the Government's summary of the allegations in the indictments, the alleged false claims were certifications by the appellees to the Commodity Credit Corporation, a corporation owned by the United States, representing that the appellees had paid higher prices for the purchase of wool than were actually paid by them. In addition, some of the counts charged that the appellees made some claims as to wool stated to have been purchased on certain occasions when, in fact, no wool had been purchased on those occasions. (Government's brief, p. 5, also, footnote 3.) An inspection of the indictments herein discloses that they contained no allegation that the Commodity Credit Corporation or the United States or any agency thereof sustained a pecuniary or proprietary loss in connection with, or as a result of, the false claims allegedly made. (Record 6-14, indictments Nos. 10759 and 10767.)

As charged in the indictments, the claims were "false, fictitious and fraudulent" *only by reason of certain false or fraudulent representations therein made.* The substance of the alleged offenses, then, is clearly the making of false and fraudulent represen-

[10]Government Brief, p. 11.

tations".[11] And, thus viewed, the offenses stand upon no different footing than the false statements charged in the case of *United States v. Marzani* or *United States v. Obermeier, supra.* Be that as it may, there is no indication whatever that the Government sustained a pecuniary loss as a result of the claims presented, even if the Commodity Credit Corporation had been induced to purchase wool which it would not have purchased had it known the true facts. The real vice of the alleged transactions may well have been, and probably was, in their disruptive effect upon certain administrative programs of the Government, but for aught we know, the Government could have derived great financial gain from the wool purchases.

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[11] Using Count 1 of Indictment 10759 (Record 6) as an example, it is alleged that the defendants knew "said claim to be false, fictitious and fraudulent *in the manner hereinafter set forth:*"

> "That said claim was made on or about November 14, 1946; that said claim is more particularly described as a Secondary Handler's Statement of wool purchases on which said defendant certified that they had paid James Farley, Yuba City, California, $915.88 for 2043½ pounds of wool; whereas in truth and in fact as defendants then and there well knew they had purchased no wool."

The form and substance of the allegation is that the false and fraudulent character of the claim presented consisted solely in the false representation that the defendant had purchased wool for a stated price. In other counts of the indictment such as Count 9 (Record 8) the allegedly false representation was to the effect that defendants had paid a stated price for the wool, whereas in fact, they had paid a different price.

The allegations in Indictment No. 10767 (Record 10-11) are even more clearly to the effect that the gist of the substantive offense charged is the *making of false statements.* Thus, Count 1 alleges that defendants conspired to commit offenses against the United States of America, to-wit: "to make false, fictitious and fraudulent claims * * * *by setting forth falsely in certain statements known as 'Secondary Handler's Statements' that purchases of wool had been made from persons in certain amounts and weights and for certain prices.*"

At most, the indictments allege a fraud in the inducement of the wool purchases which, unless a property loss is specifically alleged, can be characterized only as a fraud in the secondary or administrative sense rather than as a fraud in the primary or pecuniary sense.

That the allegations in the indictments fall entirely short of charging, expressly or by necessary implication, pecuniary fraud, can be readily demonstrated by reference to the purchasing procedure of the Commodity Credit Corporation as reflected in the form of "Wool Handlers' Agreement (Shorn Wool)," War Food Administration, Commodity Credit Corporation, Wool Form B (1945), in use during the period here involved. Section 8 of that form agreement entitled "Commodity's Purchase Price for Wool Purchased by Secondary Handler or Pool", in effect, provided that a "secondary handler" selling wool to the Commodity Credit Corporation receive the purchase price he paid plus certain allowances or the market value of the wool as determined by an Appraisal Committee of the Commodity Credit Corporation, whichever was the *lower*. (See Appendix, paragraph No. 3.) Accordingly, the Government could hardly sustain a loss even if the wool handler overstated his purchase price. No financial loss could conceivably result to the Government where the appraised value was lower than the *actual* purchase price whatever the price stated by the Seller. In that case an overstatement of the purchase price would in no wise affect the action of the Government agency and would, indeed, be wholly immaterial; yet the overstatement would suffice to establish the

making or presentation "for payment or approval" of a "false, fraudulent and fictitious claim" within the meaning of the false claims clause of the false claims statute and of the indictments herein. The mere possibility that a violation of the false claims clause of the false claims act, as alleged in the indictments, could thus be proved without evidence of any pecuniary fraud, is sufficient to demonstrate that "a defrauding of the United States or any agency thereof" is *not* an essential element or ingredient of the statutory offenses charged herein. That the particular acts alleged *may* have involved fraud, or are labeled as "fraudulent" in the *indictments,* does not bring the offenses within the purview of the suspension act as has been readily conceded by the Government. (Government's brief, pp. 8 and 9.)

C. The Suspension Act applies only to frauds arising from, or related to, the Government's war program.

The legislative histories of the suspension act and of its World War I predecessor as manifested in the House and Senate Committee Reports make it clear that the suspension of the statute of limitations was aimed exclusively at frauds arising from war contracting and other activities connected with "the gigantic war program" of the United States. (See Appendix, Par. No. 2.) The legislative history of the statute (Act of December 27, 1927, C. 6, 45 Stat. 51), which repealed the 1921 proviso to R. S. 1044, the World War I predecessor of the suspension act, is even clearer. (See Appendix, Par. No. 4.) In *United States v. Gottfried* (CCA-2, 1948) 165 F. (2d) 360, cert. den. 333 U.

S. 860, a case involving violation of wartime OPA legislation, Judge Learned Hand (at p. 368), stated that the suspension act was directed at crimes "which had been committed in the hurly-burly of war."

The offenses charged herein do not in any way "arise out of the war effort" and "had nothing to do with the war or the reconversion thereafter". See the opinion of Mr. Justice Clark, concurring, in *United States v. Smith* (1952) 342 U.S. 225, 230-231. They are totally unrelated to the "hurly-burly of war" described in the *Gottfried* case. The federal statute and regulations relating to the activities of the Commodity Credit Corporation are permanent legislation having no connection with the war emergency.

It follows that even if the acts alleged constituted a pecuniary fraud against the United States, the offenses would not come within the terms of the suspension act as they are totally unrelated to the war program of the Government.

D. The false claims provision of the False Claims Act under which the indictments herein are claimed to have been brought does not denominate fraud against the United States nor does it make such fraud, or intent to defraud, an element of the crime.

After purporting to quote the false claims clause of the false claims act making the presentation "for payment or approval" of a "claim upon or against the Government * * * knowing such claim to be false, fictitious or fraudulent * * *", a punishable offense, the Government states with much emphasis: "This offense involves a fraud, and it is labeled a fraud".

(Government's Brief p. 9.) Considered against the background of the decisions on the subject, the statement appears somewhat unsophisticated, to say the least.

In the first place, as has already been pointed out, a claim may be false and fraudulent by reason of a false and fraudulent representation therein contained without involving a fraud in the primary or pecuniary sense as required under the suspension act. This will be the case where a "fraud in the inducement" of a transaction will result in no proprietary or pecuniary loss to the United States. Secondly, the Government elsewhere in its brief admits that the mere presence of the word "fraudulent" in the statute or indictment will not suffice as the suspension act requires not the mere word, but that the offense embody fraud as an essential element of the crime. (Government Brief p. 8.)[12] Lastly, in clinging to the words "false" or "fraudulent" the Government overlooks that if the mere presence of these words were sufficient to "denominate" or constitute a fraud, any statute prescribing false or fraudulent statements such as those dealing with perjuries or with the wilful evasion of income taxes, or the *false statement clause* of the false claims statute would "denominate" or involve fraud within the meaning of the suspension act.

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[12] "* * * it will not suffice that fraud is involved in the particular acts which are alleged in the indictment as constituting a violation of the statute. *United States v. Noveck*, 271 U. S. 201. Stated another way, the crime must be so described in the statute that in order for an indictment thereunder to be sufficient it must allege acts which constitute fraud against the United States."

The Government takes issue with the lower Court's interpretation of *United States v. Scharton, supra,* wherein this Court held that the language of the suspension act (actually of a proviso extending the statute of limitations in identical terms) "is to be liberally construed in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so *denominated* by the statutes creating offenses". But while assailing the lower Court's conclusion that the false claims provision does not "denominate" the acts proscribed therein as fraud, the Government has offered nothing to impair its validity. The plain and simple truth is that the provision does *not* describe the acts as fraud nor make fraud or an intent to defraud, an element of the crime. Flinging, as the Government does, at the Court below or at appellees the charge of "mechanical literalism", does not supply the missing element in the statute.

As a last resort, the Government argues that the interpretation of the suspension act adopted by the Court below "cuts the very heart from the statute". It is claimed that few, if any, of the crimes defined in Chapter 15 of the United States Code entitled "Claims and Services in Matters Affecting Government" and in Chapter 47 Fraud and False Statements" would come within the terms of the act under the lower Court's interpretation. There is no apparent reason—and none has been stated by the Government—why the wartime suspension of limitations act should apply to the offenses defined in Chapter 15 which deals exclusively with matters affecting the

routine functions of the Government totally unrelated to any wartime problems. With reference to Chapter 47 there are a number of provisions cited in the footnote,[13] which, unlike the false claims provision involved herein, do expressly make an intent to defraud an element of the crime. But, what the Government overlooks, in the first place, is that in the light of the legislative histories of both the present act and its World War I predecessor, Congress no doubt intended that the bulk of the offenses cognizable under the statute be composed of those falling within clauses (2) and (3) of the suspension act, having to do with the Government's war material procurement activities.[14] Secondly, it should be recalled that the language of the suspension act was derived from, and is substantially identical with, the comparable provisions of the 1921 proviso to R.S. 1044 quoted

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[13] "* * * possessing or using, with intent to defraud the United States, forged, altered or counterfeited contracts, deeds, powers of attorney, certificates, orders or other writings in order to obtain money from the United States (Secs. 495, 1002); altering, forging or counterfeiting contracting bonds, bids, contracts or public records with intent to defraud the United States (Sec. 494); making false entries, statements or reports to Federal credit or lending institutions with an intent to defraud the United States or its agencies (Sec. 1006), improperly delivering certificates, vouchers or receipts for military or naval property with an intent to defraud the United States (Sec. 1022); and delivering insufficient money or property for military or naval services with an intent to defraud the United States (Sec. 1023). See also chapter 103: The keeping or making of false entries or accounts by any employee of the United States with an intent to defraud (Sec. 2073)."

[14] This is especially clear when it is considered that the enactment and amendment of the Suspension Act in 1942 and 1944, respectively, was in connection with legislation affecting war contract settlements and the disposal of war property. See: Appendix, Par. No. 2.

in Appendix, Note 1. By a series of unanimous decisions of this Court in the *Noveck, McElvain* and *Scharton* cases, it became the settled construction of the 1921 proviso that it applied only where the offense, under its statutory definition, embodied fraud as a necessary ingredient or was "denominated" a fraud under the statute creating the offense. When Congress re-enacted the identical language in the 1942 suspension act, and again in the 1944 amendment and thereafter in the 1948 revision of the Criminal Code, it must be presumed, under well established principles, to have adopted the judicial construction theretofore placed upon the pertinent provision. Congress expressly recognized that construction in the Conference Report of the House on the 1932 Revenue Act. (H.R. Rep. 1492, 72nd Cong., 1st Sess., p. 29.) Accordingly, in that act, Congress amended the conspiracy statute, Section 37 of the Criminal Code, to provide that conspiracies involving a violation of the *revenue laws* which, under the *Scharton* and *McElvain* cases, were without the scope of the 1921 and 1926 provisos, were, nevertheless, subject to a six-year limitations period. Congress' failure, in view of its awareness of the judicial construction of the crucial provision to include amendatory language with reference to Chapters 15, 47, or any other chapter of the Criminal Code clearly indicated that it was content to have the narrow construction applied to the suspension provision, notwithstanding the resulting exclusion therefrom of the classes of offenses referred to in the Government's brief.

Finally, in a recent opinion, concurred in by eight of the justices, this Court regarded it as "obvious" that the suspension act was inapplicable to the false claims *statute* without limiting its observation to any of the clauses therein. *United States v. Beacon Brass Company* (1952)[15] 344 U.S. 43. This Court, at least, did not consider that the suspension act was emasculated by the exclusion therefrom of violations of the false claims statute.

E. The applicability of the Suspension Act to an alleged offense is determined by reference to the underlying statute as a whole and not by referncee to the particular clause or provision thereof involved in the indictment. If the statute can be violated without the commission of a pecuniary fraud, the Suspension Act does not apply.

Appellees contend that even if the acts charged in the indictment and the false claims provision of the false claims statute under which the indictment was brought constitute or denominate a fraud in the pecuniary sense, the suspension act would not apply for the reason that the applicability of the act is determined by reference to the statute as a whole rather than by reference to a particular provision thereof or the allegations of the indictment.

The decisions of this Court uniformly hold that the applicability of the suspension act in any case is determined by reference to the statute creating the of-

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[15]The Court observed, referring to the false claims statute, Section 35a of the Criminal Code:

"*Obviously*, at the times of the indictments here, the three-year limitation period; 18 USC (Supp. V) Sec. 3282, for violations of this statute had expired as to statements made in October 1945."

fense under which the indictment was drawn. The act may be invoked only if fraud in the pecuniary sense is a necessary element of any violation of the statute defining the offense.[16] Conversely, if the statute can be violated without the commission of a pecuniary fraud, that is, if an allegation of acts short of pecuniary fraud may state an offense under the statute so as to render the indictment sufficient against a demurrer, offenses under the statute in question are not within the scope of the suspension act. This, it is submitted, is a fair synthesis of the rulings of the Supreme Court in the *Noveck, McElvain* and *Scharton* cases, and of the Courts of Appeal for the District of Columbia and of the Second Circuit in *Marzani v. United States, supra,* and in *United States v. Obermeier, supra.* We are aware that the decision of the Second Circuit in *United States v. Gottfried* (CCA-2, 1951) 165 F. (2d) 360, *cert. den.* 333 U.S. 860, is in conflict with the ruling in the *Marzani* case but it appears that in any event, the *Gottfried* case was superseded, if not expressly overruled by the Second Circuit's decision in the *Obermeier* case.

It is well settled that the false claims statute 18 USC Section 80 (1946 ed.) can be violated without

[16] In *United States v. Gottfried* (CCA 2, 1951) 165 F. (2d) 360, cert. den. 333 U.S. 860, however, the Second Circuit rejected the argument that the Suspension Act is limited to pecuniary frauds and, in effect, gave the term "fraud" as used in the Act, a broad construction which made its scope co-extensive with that of Section 37 of the Criminal Code construed in *Haas v. Henkel* (1910), 216 U. S. 462, 479. Significantly, the opinion in the *Gottfried* case fails to cite a single one of the Supreme Court rulings dealing with the identical language in the 1921 and 1926 predecessors of the Suspension Act.

the commission of a pecuniary fraud as by the violation of the false statement clause,[17] inasmuch as the statute since the 1934 amendment is broad enough to include administrative as well as pecuniary frauds.[18] *United States v. Gilliland* (1941) 312 U.S. 86. *Marzani v. United States*, supra and *United States v. Tomasello* (CCA-2); (160 F. (2d) 348) where it was held that lack of an intent to defraud the United States is not a defense under an indictment charging a violation of false statement clause. Since a charge of fraud or an intent to defraud is not necessary to constitute a violation of the false claims statute, the suspension act has no application to any offense framed under that statute.

If any doubt existed as to the validity of the foregoing conclusion, it is set at rest by this Court's decision in *United States v. Beacon Brass Co.* (1952) 344 U.S. 43. The indictment in that case, brought on March 16, 1951, charged the making of false and fraudulent statements to representatives of the Treasury Department on or about October 24, 1945. The allegations were framed in such a manner as to bring

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[17]The Government proceeds from an obviously erroneous premise when it states:

"Criminal liability under the False Claims Act *depends* upon a showing that the defendant presented for 'payment or approval' a 'claim upon or against the Government * * * knowing such claim to be false, fictitious or fraudulent * * *.' 18 USC (1946 ed.) 80."

Criminal liability under the False Claims Act may be incurred by a violation of the false statement clause as well as by a violation of the false claims clause.

[18]18 USC Section 80 (1946 ed.) is substantially identical with Section 35 of the Criminal Code as amended in 1934, embodying but minor changes of a 1938 amendment. (1952 Stat. 197.)

the offense within the purview of both Section 145(b) and of the false claims statute involved herein, Section 35(A) of the Criminal Code, 18 USC Section 80 (1946 ed.) While upholding the indictment under the six-year limitations statute applicable to Section 145(b) of the Internal Revenue Code, this Court, after quoting the pertinent false statement clause of the false claims statute, stated with reference to the statute:

> "*Obviously,* at the times of the indictments here, the three-year limitation period, 18 USC (Supp. V) Sec. 3282, for violations of this statute had expired as to statements made in October 1945."

The Court did not limit its observation to any particular clause or provision under which the indictment was brought. Instead, in this very recent opinion, the Supreme Court regarded it as "obvious" that the ordinary three year period of limitation should apply to "*violations of this statute*", rather than the extended period provided for by the suspension act. Thus, the applicability of the wartime suspension of limitations act is tested by reference to the underlying statute as a whole and hence none of the offenses alleged herein are reached by the suspension act.

III. EVEN IF THE SUSPENSION ACT, 18 USC 590(a) (1946 ed.), IN TERMS, APPLIED TO THE OFFENSES CHARGED HEREIN, THE SUSPENSION WAS LIFTED ON SEPTEMBER 1, 1948, THE DATE THE REPEAL OF THE STATUTE BECAME EFFECTIVE. ACCORDINGLY, PROSECUTION WAS, IN ANY EVENT, BARRED ON SEPTEMBER 1, 1951.

It is assumed in this section of the argument that the suspension act operates to suspend the "running" in a literal sense rather than the "bar of the statute" as contended by the Government in *United States v. Klinger,* No. 507, this term. We take issue with this contention in the ensuing portion of the argument.

The wartime suspension of limitations act of 1942, as amended, was, at the time of the alleged offenses embodied in Section 590a of Title 18 USCA, 1946 ed. The act of June 25, 1948, 62 Stat. 683, which revised the Criminal Code, repealed Section 590(a). (*Id.* 862, 868.) The act also re-enacted as 18 USC § 3287, a provision substantially identical in terms with the repealed section except that the new provision was cast in the form of permanent, rather than temporary legislation, designed to operate prospectively in times of future wars. (*Id.* 828, 18 USC § 3287.) The act of June 25, 1948, including the repeal of Section 590a and the enactment of Section 3287 took effect on September 1, 1948. (*Id.* 862.) Section 21 of the act preserved all "rights or liabilities" under the repealed sections.

There is no question that if Section 590(a) had been repealed without the enactment of a saving clause and without the re-enactment of a similar suspension statute, the suspension would have been lifted on the date the repeal became effective, to-wit, on

September 1, 1948. The new suspension statute Section 3287 of 18 USC which took effect on September 1, 1948 could not be retroactively applied to offenses committed in 1946. The language in which Section 3287 is cast ("when the United States is at war, the running of any statute of limitations * * * shall be suspended"), is appropriate only to prospective and not to retrospective application. Moreover, the reviser's note confirms that the legislative intent was to enact permanent legislation aimed at future war emergencies.[10] Thus, if any suspension should have endured beyond September 1, 1948 it must have been by virtue of the saving clause of the act of June 25, 1948 (Section 21 thereof), or such other applicable savings clause as may have existed in other statutes in force at the time of the repeal. We have reference to 1 USC 109 (Supp. II) formerly R.S. Section 13 incorporated in the United States Code in 1947 which reads as follows:

> "Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liabil-

[10] *Reviser's Note.*

"The phrase 'when the United States is at war' was inserted at the beginning of this section to make it permanent instead of temporary legislation, and to obviate the necessity of re-enacting such legislation in the future."

61 Stat. 633.

> ity. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The question presented is this: Does the suspension of the applicable statute of limitations (if any was at all operative under the repealed Section 590a), constitute a "right" of the Government or "liability", "penalty" or "forfeiture" of the defendant within the meaning of the savings clause of either the act of 1948 or Section 109 of 1 USC?

The Court of Appeals for the Second Circuit in *United States v. Obermeier* (CCA-2, 1940) 186 F. (2d) 243, considered the effect of both statutory provisions. After an exhaustive review of the pertinent authorities, the Court concluded that both savings clauses related to substantive rights and liabilities, that is, to the Government's "right" to punish or the defendant's "liability" to punishment under the substantive statute creating the offense. The savings provisions do not preserve "remedies" or "procedure" prescribed in a repealed statute. A statute of limitations is traditionally considered no part of a "right" or "liability" but as affecting the "remedy" only. The Court concluded that the savings clauses in question did not preserve the five year statute of limitations applicable to naturalization offenses under the

pre-1948 version of the Criminal Code, so that the five-year limitation period was, after September 1, 1948 replaced by the three-year limitation provided under the 1948 revision of the Code.

The *rationale* of the *Obermeier* decision is equally applicable to the suspension act which represents merely an exception to the general statute of limitations. It could hardly be suggested that the suspension act creates substantive liabilities, even if the suggestion had not been expressly repudiated by the United States Supreme Court. *United States v. Noveck, supra.* Accordingly, the provisions of Section 21 of the 1948 act and of 1 USC Section 109 (Supp. II), did not preserve beyond September 1, 1948—the date upon which the repeal of Section 590(a) became effective—the suspension prescribed by the repealed section if such suspension was at all operative as to the offenses in question.

The United States Supreme Court in an advance opinion in the case of *United States v. Smith* (1952) 342 U.S. 225, while refraining from passing directly upon the point, appears to have expressed its accord with the Second Circuit in the *Obermeier* case, thus supporting our own conclusion concerning the effect of the repeal of the suspension act. Said the Court:

> "Section 21 of the 1948 Act preserved all 'rights or liabilities' under the repealed sections. We assume, without deciding, that this reservation has no effect on the running of a statute of limitations. See United States v. Obermeier (CA 2d NY) 186 F. 2d 243, 251."
>
> Footnote 1, 342 U.S. 226.

It follows that the three-year limitation period began to run not later than September 1, 1948 and the statutory period expired not later than September 1, 1951. The indictments herein having been filed after the last-mentioned date are, thus, barred by 18 USC 3282, the applicable statute of limitations in force on the date of the indictment.

IV. EVEN IF THE SUSPENSION ACT APPLIED TO THE OFFENSES CHARGED AND THE SUSPENSION SURVIVED THE REPEAL OF SECTION 590(a) IN 1948, UNDER THE PROPER CONSTRUCTION OF THE ACT, PROSECUTION OF THE ALLEGED OFFENSES WAS BARRED AFTER DECEMBER 31, 1949, THREE YEARS AFTER THE PROCLAMATION TERMINATING HOSTILITIES.

A. The decisions of this Court which considered, or passed upon, the point at issue uniformly uphold the construction of the act urged by appellees.

So far as the language of the wartime suspension of limitations act is concerned, the questions of statutory interpretation presented on these appeals revolve around two separate key phrases used in the act. The first question which is present in the instant cases as well as in *Bridges v. United States*, No. 548, this term, concerns the meaning of the term "fraud" or "defrauding". The second question raised by these appeals is what Congress meant by the clause "the *running* of any existing statute of limitations * * * shall be *suspended*". The second question is shared by the instant cases not with the *Bridges* case but with the case of *United States v. Klinger*, No. 527,

this term, wherein the Government seeks review of the Second Circuit's decision in *United States v. Klinger* (CCA-2, 1952) 199 F. (2d) 645.

Whereas the first question (discussed in Section II of the argument) controls the applicability of the suspension statute to the offenses charged, the second question determines the operation of the statute if it be held applicable, or, to be precise, the exact date when prosecution of an offense is barred under a suspended limitations period.

Appellees construe the term "the running" of the limitations statute to mean its "having run" rather than its present running. Accordingly they contend that the act suspends until December 31, 1949, not the *commencement* of the applicable limitations period, but its *expiration*. Judge Learned Hand in the *Klinger* case expresses the same conclusion by stating that the act operates to suspend "the bar" of the limitations statute, not its "running" in a literal sense. The Government, on the other hand, contends that where the suspension act is applicable, the running "in a literal sense" is suspended so that the statute does not *start* to run until December 31, 1949.

The operation, as distinct from the applicability of the suspension act, was the subject of three leading decisions rendered in the past year. This Court considered the problem in *United States v. Beacon Brass Co.* (1952) 344 U.S. 43, and especially in *United States v. Smith* (1952) 342 U.S. 225. The United States Court of Appeals for the Second Circuit passed upon the precise issue involved herein in *United States v.*

Klinger (CCA-2, 1952) 199 F. (2d) 645, cert. granted, No. 527, this term.

1. *United States v. Beacon Brass Co.*

The indictment involved in that case was returned on March 16, 1951. It charged a wilful attempt to evade taxes under Section 145(b) of the Internal Revenue Code by making false and fraudulent statements and representations to the representatives of the Treasury Department on or about October 24, 1945. The allegations were framed in such a manner as to bring the offense within the purview of both Section 145(b) and of the false claims statute involved herein, Section 35(A) of the Criminal Code, 18 USC 80 (1946 ed.). While upholding the indictment under the six year limitations statute applicable to Section 145(b) of the Internal Revenue Code, this Court, after quoting the pertinent clause of the false claims statute, stated:

> "*Obviously,* at the times of the indictments here, the three-year limitation period, 18 USC (Supp. V) Sec. 3282, for violations of this statute had expired as to statements made in October 1945."

The three-year statute would *not* have expired under the Government's construction of the suspension act which is to the effect that the statute does not *start* to run until January 1, 1950. It *would,* of course, have expired under appellees' view that the bar of the statute is suspended until December 31, 1949. If the Court should hold the suspension act to be applicable to offenses under the false claims statute,

then, *by necessary implication,* the Court adopted appellees' view in regard to the operation of the act. The Government contends that "the possibility that the statute had been tolled by the Suspension Statute was neither raised nor presented for decision in that case". (Government Brief, p. 12, Footnote 10.) This contention overlooks the inherent presence of the issue in the observation of the Court which could hardly have been inadvertent. And, what is more, in characterizing its conclusion as to the expiration of the three-year statute as an "obvious" one, the Court, most likely, had reference to the date of December 31, 1949 on which the bar of the statute (extended under the suspension act) had fallen rather than to the the inapplicability of the suspension act on conceptual grounds, a point which is not so readily apparent.

2. *United States v. Smith as construing the term "suspended".*

In *United States v. Smith, supra,* this Court decided that the suspension act did not apply to offenses committed after December 31, 1946 the date of termination of hostilities.

In supporting this conclusion the leading opinion in the *Smith* case took the position that the suspension act operated to suspend the running of the limitations statute only during the period between the commission of the crime and the termination of hostilities when the law enforcement agencies of the Government were preoccupied with the war effort. At the termi-

nation of hostilities when "the pressure was off" the three year period prescribed by the suspension act began to run and did so, *in lieu,* of the three year year period provided by the general statute of limitations. Speaking for the Court, Mr. Justice Douglas stated:

> "Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly. *The time when law enforcement officers were busy with war activities is not counted; when the pressure was off, the time begins to run again. No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the suspension seem advisable."* (Emphasis supplied.)

The leading opinion in the *Smith* case is perhaps susceptible of two interpretations, both of which lead, however, to the same result. The first interpretation is addressed to the meaning of the term "suspended", the second to that of the term "the running of any existing statute of limitations as these terms are used in the suspension act.

According to the first interpretation of the *Smith* case, the effect of the wartime suspension of limitations act, where applicable, was to "set aside" or "render inoperative" (such being the meaning of the term "suspend") the general statute of limitations for the duration of the war emergency and the ensuing three year period. Thus, the regular three

year limitations period running from the date the crime was committed, was *replaced* by a three year period running from the date of the declared termination of hostilities. *Upon the expiration of the latter three year period, prosecution was barred, once and for all,* contrary to the view that the period prescribed by the general limitations statute was postponed until that time when it began to run again. The dictionary definition of the term "suspend" includes the meaning "to set aside or to make temporarily ineffective" as well as the meaning "postpone".[20] The gist of the first interpretation of the opinion in the *Smith* case is that the general limitations statute or the period prescribed thereby is not *postponed,* but is rendered inoperative or set aside until December 31, 1949; accordingly, the regular limitations period was replaced or superseded by a period for prosecution ended on that date.

3. *United States v. Smith and United States v. Klinger as construing the "running" of the limitations statute to mean "the bar of the statute".*

Another and, no doubt, more authoritative interpretation of the *Smith* case is presented by Judge Learned Hand in *United States v. Klinger, supra.* For the purpose of the issue under discussion, the facts in the *Klinger* case closely parallel those in the instant cases. The offenses charged were committed prior to December 31, 1946 and the indictments were returned (as the indictments herein) after Decem-

[20] Webster's New International Dictionary (2d ed., 1934).

ber 31, 1949. In a unanimous decision, the United States Court of Appeals for the Second Circuit reversed the District Court's judgment of conviction, holding that prosecution of the offenses was barred after December 31, 1949 and not after December 31, 1952 as the Government contended. Judge Learned Hand who wrote the opinion for the Court was concerned, not with the construction of the term "suspended" but with an analysis of the term "the running of any existing statute of limitations" as that term is used in the suspension act.

Judge Learned Hand concluded that the clause did not mean the running of the limitations statute in "a literal sense", but meant "the bar of the statute". If the bar of the applicable limitations statute was suspended until three years from the termination of hostilities, prosecution of offenses falling within the terms of the suspension act was outlawed after December 31, 1949.

The Second Circuit's opinion was based upon the ground, first that the construction adopted above preserved the original purpose of the 1942 suspension act to extend existing limitations periods *only by the time elapsing before the termination of hostilities* and upon the further ground that the construction advanced by the Government would, as to frauds committed prior to the termination of hostilities, enlarge the period of prosecution beyond the limit which Congress would have conceivably tolerated.

Finally Judge Learned Hand rested his construction of the suspension act upon the authority of

United States v. Smith, supra. Proceeding from a carefully considered analysis of the several opinions rendered in the *Smith* case, the judge concluded that the United States Supreme Court too, or at least a majority thereof, had construed the term "running" to mean "the bar of the statute".

B. The legislative purpose of the Suspension Act as revealed by its legislative history was to insure that the Government had three years following the declared termination of hostilities within which to dispose of the entire accumulation of wartime frauds.

The conclusions of Judge Learned Hand in the *Klinger* case and those of the majority of the Court in the *Smith* case are bottomed primarily upon the underlying legislative purpose of the suspension statute as revealed in the committee reports. In enacting the 1942 suspension act, Congress wanted to insure that wartime frauds against the Government could be discovered and punished "even after the termination of the present conflict." (See Appendix, Par. No. 5.) The history of the 1944 amendment supports the same view. Congress realized that the bulk of the offenses cognizable under the suspension statute would not be apprehended or investigated until the end of the war and that a reasonable period thereafter would be required to permit such offenses to advance to the stage of litigation. The connotation is that three years after the termination of hostilities is what Congress considered a reasonable period for the prosecution of offenses cognizable under the statute. (See Appendix, Par. No. 6.) Moreover, Congress could hardly have provided that crimes committed before "hostil-

ities" had ended should be allowed a period of limitation equal to the time elapsed before that date plus *six* years, whereas similar crimes committed after the termination of hostilities should have but a three year limitation period.

Answering the Government's contention in the *Klinger* case that in passing the suspension act, Congress contemplated a period of limitation of six years following the termination of hostilities, Judge Learned Hand referred to the language[21]—quoted in the footnote—of the Senate Report relating to the 1944 amendment and proceeded with the following analysis:

> "That language was certainly a most equivocal way of saying that accumulation of cases was so great that twice the time had become necessary to clear it up after 'hostilities' had ended. And that aside, it would be unreasonable to impute to Congress a purpose to pass an act providing that crimes, committed before 'hostilities' had ended, would have a period of limitation made up of all the time that has elapsed before that date plus twice the period allowed for crimes committed after 'hostilities' ended. All the crimes equally became a part of 'the bulk of offenses cognizable under this statute' with which the 'law-enforcement branch' had to deal after December 31, 1946; and there was no reason to suppose that the later crimes would be "apprehended or investigated' before the earlier. Indeed, so far

[21] "It is clear that the bulk of the offenses * * * will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation."

Senate Report No. 1057, 78th Cong., 2nd Sess., p. 14.

as any speculation whatever is in order, it would be that the earlier offenses would be earlier discovered. Moreover, all such crimes would be equally injurious to the interests of the United States, so that we must not suppose that Congress would be more lenient as to a part of them than as to the rest. For these reasons we cannot * * * suppose that Congress meant to give the 'law-enforcement branch' twice the time to detect the second that it was to have to detect the first."

The committee reports clearly indicate that, in enacting the suspension statute, Congress was concerned primarily with offenses subject to the general three year limitations period.[22] Once it is settled that the legislative purpose was to insure that, notwithstanding the prior expiration of the regular limitations statute, the Government had a three year period following the termination of hostilities within which to prosecute wartime frauds, it can readily be demonstrated, not only that the language used by Congress was entirely in conformity with normal usage, but that the results flowing from the construction contended for by appellees are precisely the results that the Legislature must have contemplated *in the concrete occasions* which may arise under the statute. For, as Judge Learned Hand has said in the *Klinger* case,

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[22]See, Senate Report No. 1544, 77th Cong., 2nd Sess., pp. 1-2, quoted in paragraph 5, appendix, where it is stated, *inter alia:*

"During normal times *the present 3-year statute of limitations* may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute frauds against the Government. * * *." (Emphasis supplied.)

what we must do in cases involving statutory construction "is to project ourselves, as best we can into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion". It is with this injunction in mind that the following observations are offered.

C. The construction of the criticial clause urged by appellees is one which adheres to the accepted meaning of the statutory language according to normal usage.

Borrowing another phrase from Judge Learned Hand's opinion, the word "running" is a colloquial term, not a word of art. *Colloquially,* the term is used in the present tense, to denote a "running" of limitations period; but the term is also used in the past tense to denote an *expiration* of the statutory period as when we say "the statute *has run*" against an offense. The grammatical form of the present participle when used as a noun may at first suggest a present running rather than a "having run" but actually such grammatical form, in everyday usage, denotes as often and perhaps more often, a *past* rather than a present act or state. Accordingly, when Congress provided, in colloquial terms, for the suspension of the "running" of the applicable limitations statute, the reference most likely—using colloquial language—was to the "statute's *having run*" rather than to the "statute's present running". In other words, what Congress suspended was not the running of the statutory time but its *expiration.* From the day the offense was committed, the statutory clock was to run as it would in any other case, but ere the

cycle was completed, the hand, just as it approached the end of its journey, was to be suspended and held suspended until three years from the termination of hostilities.

D. When tested by projected results the construction urged by appellees fully effectuates the legislative purpose of the Suspension Act, and, at the same time, preserves the beneficial policy of the statute of limitations. By contrast the Government's construction of the Act subverts the policy of the statute of limitations and constitutes a radical departure from established legislative policy and judicial traditions.

If the suspension operated upon the *expiration* of the statutory period (or, as Judge Learned Hand puts it, upon "the bar of the statute"), it follows that the suspension statute could apply only to statutory periods *which actually expired* prior to the suspension limit of December 31, 1949. For example, if an offense coming within the terms of the suspension act was committed before the termination of hostilities and was subject to a three-year limitations period, the Government had the regular limitations period plus the time elapsed from the expiration of such period to December 31, 1949 within which to prosecute the crime. Accordingly, with regard to offenses committed prior to the termination of hostilities (which were the target of the suspension statute), the suspension operated to give the Government a limitation period equal to three years, plus whatever time had elapsed between the commission of the offense and the termination of hostilities. Thus, the suspension of the "expiration" of the limitations period produced the same *result* as if the "running" of the stat-

ute had been suspended until (and not beyond) the termination of hostilities. That same result has been expressed in similar language by the leading opinion in *United States v. Smith, supra,* which rejects the suggestion that the act "suspends the running of the statute" beyond the wartime emergency.[23]

The restriction of the suspension statute to limitations periods which actually expired prior to December 31, 1949 is entirely harmonious with the Congressional purpose contended for. After all, as to wartime offenses for which the applicable limitations period expired after December 31, 1949 the Government would, *independently of the suspension act,* have had the three-year period which Congress considered necessary for discovery and prosecution of the entire accumulation of wartime frauds; hence there was *no need* for Congress to provide for a suspension and to extend the statute to such offenses. Assume *arguendo,* that an offense involving a fraud against the United States had been committed in June, 1945, and was subject to a six-year limitations statute. Since the statutory period would not have expired prior to the suspension limit of December 31, 1949 it would not be subject to suspension under the construction contended for by appellees and, consequently, the Government would have had the regular limitations

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[23] "The time when law-enforcement officers were busy with war activities *is not counted:* when the pressure was off, the time began to run again. No reasons of policy are suggested for straining the language of the Act *to suspend the running of the statute beyond the emergency* which made the suspension seem advisable." (Emphasis supplied.)

period ended in June, 1951, within which to prosecute the crime. On the other hand, though an offense be subject to a six-year limitations period, if it was committed at any time before January 1, 1944, so that the regular limitation period expired before December 31, 1949, the suspension provision *would* be applicable so as to enlarge the period for prosecution by the time between the expiration of the regular limitations period and December 31, 1949. Again, Congress would reasonably consider such a result necessary to accomplish its purpose if the Government was to have a full three-year period following the termination of hostilities to cope with the accumulation of wartime frauds.

Summarizing the above observations, if the suspension act be construed as proposed by appellees, the act, where applicable, would operate to extend the period for prosecution until December 31, 1949 as to any crimes against which the pertinent limitations statute *(whatever the period)* had theretofore expired; the act would not, however, affect the period for prosecution in cases where the prescribed limitations period endures beyond December 31, 1949. The projected results effectuate the legislative purpose of the suspension act of insuring a period of prosecution comprising, in addition to the time elapsed before the termination of hostilities, the three-year period following thereafter. At the same time the construction urged by appellees preserves the beneficial policy of the statute of limitations that an accused should not come to trial after an unreasonable lapse of time.

By contrast, if the Government's construction of the act should prevail, namely, that the *commencement* rather than the expiration of the applicable limitations period is suspended until December 31, 1949, a large amount of the federal criminal jurisdiction would be made subject to prosecution periods extending over as long as thirteen years. For example, an offense involving fraud committed in 1942 after the enactment of the 1942 suspension act which (as in the case of offenses under the Revenue Laws)[24] is subject to a six-year limitations statute could be prosecuted until December 31, 1955—thirteen years after the 1942 act, and *nine* years after the declared termination of hostilities. The extreme position urged by the Government would virtually obliterate the beneficial policy of the statute of limitations as to offenses reached by the suspension act. The resulting threat to the fair administration of federal justice would, indeed, become alarming if this Court were now to depart from the sound principles of the *Noveck, McElvain* and *Scharton* cases and thus broaden the scope of the suspension act to embrace a wide and, presumably, ever-growing variety of "so-called frauds not so denominated by the statute creating the offense" or frauds not arising from the "hurly-burly of the war" and unrelated to the war emergency.

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[24] Offenses under the Revenue Laws are not expressly excluded from the 1942 Suspension Act, whereas they were so excluded from the general statute of limitations to which the 1921 Suspension, construed in the *McElvain* case, was a proviso. If the Court were to abandon the ground of the *Noveck, McElvain* and *Scharton* cases, there is no reason why offenses under the revenue laws should not be within the scope of the Suspension Act.

As Mr. Justice Story put it in *Bell v. Morrison*, 1 Pet. 351, 360 (U.S. 1828): "A Statute of limitations is a wise and beneficial law * * *." See, also *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 390 (U.S. 1869). Or, as is stated in *Wood v. Carpenter* (1879), 101 U.S. 135, 139:

> "Statutes of Limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence * * *. An important public policy lies at their foundation."

And, again, in the *Scharton* case, this Court emphasized the principle that statutes of limitations are to be "liberally interpreted in favor of repose" and in the *McElvain* case that exceptions to the statute of limitations are to be "strictly construed". Thus, even though the problem of statutory construction presented herein not be free from doubt—and few such problems are—the question should be resolved in favor of the accused. But that aside, it has been shown that under the construction urged by appellees the suspension act would operate (as a reasonable Legislature mindful of balancing the Government's interest against the rights of the accused would provide), to combine adequate leeway for the Government with reasonable regard for the policy of the statute of limitations. The Government, on the other hand, would have the Court, by construction, sweep aside, in a large field of federal criminal jurisdiction, the wise and beneficial policy of the statute of limitations so deeply embedded in our statutory law and in

the traditions of this Court. There is no persuasive reason in the language of the act, ambiguous though it be, for so drastic a change. Certainly the purpose of the act as revealed by the legislative history and its previous construction by this Court and the Court of Appeals for the Second Circuit are an unequivocal rebuttal of the Government's extreme position.

CONCLUSION.

For the reasons herein stated we respectfully submit the decision of the District Court dismissing the indictments should be affirmed.

Dated, San Francisco, California,
April 24, 1953.

JOHN V. LEWIS,
Attorney for Appellees.

CLYDE C. SHERWOOD,
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Of Counsel.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

1. (a) The False Claims Statute, as it stood at the time that the offenses charged in the indictments herein are alleged to have been committed, is found in Title 18 of the 1946 edition of the United States Code, and reads as follows:

> "Section 80. (Criminal Code, section 35(a).) Presenting False Claims.
>
> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made, any false or fraudulent statements or representations, or make or use or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a

stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

(b) In the same title of the same edition of the United States Code there was to be found the General Conspiracy Statute:

"Section 88. (Criminal Code, section 37.) Conspiring to commit offense against the United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

(c) And finally, there was to be found in the same title, the 1942 Wartime Suspension of Limitations Act as Amended, section 590a, reading as follows:

"Suspension of limitations on offenses involving the defrauding of the United States.

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is

connected with or related to the prosecution of World War II, or with any disposition or termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1614, 1615-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the Two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses or transactions which are already barred by provisions of existing law."

(d) The Wartime Suspension Act as originally passed in 1942, 56 Stat. 747, reads as follows:

"That the running of any existing statute of limitations applicable to the offense, involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945 or until such earlier time as the Congress by concurrent resolution, or the President, may designate."

This Act was amended by the Contract Settlement Act of 1944, 58 Stat. 649, 667 and the Surplus Property Act of 1944, 58 Stat. 765, 781, which eliminated the phrase "now indictable under any existing statutes"; added the clauses now numbered (2) and (3) of 18 USC Section 590a and changed the suspension date from June 30, 1945 to three years after the ter-

mination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

(e) The successor of Section 590a, *supra,* is Section 3287 of Title 18 of the 1948 revision of the United States Code, and reads as follows:

"Wartime Suspension of limitations.

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

"Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section."

(f) The Wartime Suspension of Limitations Act adopted language similar to that contained in a proviso added to the general three-year statute of limitations, R.S. 1044, by the Act of November 17, 1921, C.

124, 42 Stat. 220, which is hereinafter quoted. This is the proviso construed in the cases of *United States v. Noveck* (1926) 271 U.S. 201 and *United States v. McElvain* (1926) 272 U.S. 633:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046 [crimes under revenue laws or slave trade laws], unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitations shall be six years. This Act shall apply to acts, offenses, or tran actions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

(g) Section 1110 of the Revenue Act of 1926, 44 Stat. 9, 114, contains a similar proviso which was construed in the case of *United States v. Scharton* (1932), 285 U.S. 518, and was also referred to in *United States v. McElvain; supra.* The section provided as follows:

> "That no person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: Provided, that for

offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924 * * *."

(h) The Criminal Appeals Act, 18 USC Section 3731 reads as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

2. We are referring to House of Representatives Report No. 2051, 77th Cong., 2nd Sess., accompanying H. R. 6414, the wartime suspension of limitations act as originally passed in 1942 (56 Stat. 747). In that

report, following a statement of the purpose of legislation (to suspend the statute of limitations applicable to offenses involving defrauding the United States), it is said:

> "Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill."

After discussing the problems faced by the Department of Justice and the need to give it more time to investigate and gather evidence of frauds against the Government, the report further states:

> "The United States, however, is engaged in a gigantic war program. *Huge sums of money are being expended for materials and equipment in order to carry on the war successfully.* Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." (Emphasis supplied.)

The same observations in substantially identical language are also contained in the Senate Report accom-

panying H. R. 6484." (Senate Report No. 1544, 77th Cong., 2nd Sess., pp. 1-2.)

3. Section 8 of the form of Wool Handlers' Agreement (Shorn Wool), War Food Administration, Commodity Credit Corporation, Wool Form B (1945) in use during the period involved in the indictments reads as follows:

> *"Commodity's Purchase Price for Wool Purchased by Secondary Handler or Pool.* Commodity's purchase price for wool purchased from a secondary handler or a pool who purchased such wool from producers shall be an amount equal to the amount paid the producers for such wool plus:
>
> (i) In the case of wool which the secondary handler or pool has collected in bulk from farms and transported at his or its own expense from farms to country assembly points, rough-graded at his or its own expense, packed at his or its own expense in his or its own bags, stored at his or its own expense prior to shipment to the Handler, and delivered or loaded on trucks or cars for shipment to warehouse of the Handler other than a local warehouse—two and one-half (2½) cents per pound, grease weight, for lots of 5000 pounds or more, or one and three-fourths (1¾) cents per pound, grease weight, for lots of less than 5000 pounds;
>
> (ii) In the case of wool which producers have delivered to the secondary handler or pool at country assembly points, including the secondary handler's or pool's warehouse, and with respect to which the secondary handler has performed the other services specified in (i) above

—two and one-fourth (2¼) cents per grease pound, for lots of 5000 pounds or more, or one and one-half (1½) cents per grease pound, for lots of less than 5000;

(iii) In the case of wool with respect to which the secondary handler or pool has performed *all* of the services specified in either (i) or (ii) above—one and one-half (1½) cents per grease pound for 5000 pounds or more, or one (1) cent per grease pound, for lots of less than 5000 pounds;

Provided, however, That such purchase price shall in no event exceed the appraisal value less the deductions specified in paragraph 7.

The Handler shall not accept wool purchased by a secondary handler unless such wool is accompanied by a certificate of the secondary handler, in form approved by Commodity, showing the quantity of wool purchased from and the name of each producer, the respective amounts paid or payable for such wool, and containing a notation of the County Agricultural Conservation Committee for the county in which the secondary handler maintains his principal place of business that a copy of such certificate showing also the addresses of the producers covered thereby has been filed with such County Committee.

The Handler shall not accept wool purchased by a secondary handler if such wool is commingled with wool received by a secondary handler on consignment."

4. House of Representatives Report No. 2051, 77th Cong., Second Sess., accompanying H. R. 6484, which

is the 1942 Suspension Act, described the World War I predecessor of the Suspension Act as aimed at frauds against the Government, arising out of the Government's activities during the war with Germany. The report reads in part as follows:

> "In connection with the World War legislation of this character the committee report (H. Rept. 365, 67th Cong.) stated the following:
>
> > 'The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds.' "

In connection with the Statute (Act of December 27, 1927, c. 6, 45 Stat. 51) which repealed the 1921 proviso to the statute of limitations, the House Report (H. R. Rep. 16, 70th Cong., 1st Sess.) stated, "In 1921 the Attorney General represented that he was desirous of having further time to investigate alleged war frauds". The sponsor of the repealing legislation in the House, Mr. La Guardia, stated on the floor (69th Cong. Rec. 842) that the 1921 suspending proviso "was intended to apply only to war frauds * * * The war frauds are cleaned up by this time * * * If anyone has defrauded the Government in cases arising out of the

war, if he has not already been indicted, there is not much chance of indicting him now."

(5) Senate Report No. 1544, 77th Cong., 2nd Sess., pp. 1-2:

"The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

* * * * * * *

"During normal times the present 3 year statute of limitations may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute frauds against the Government. The United States however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government it is recognized that in the varied dealings, opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as it is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many

duties, including the enforcement of the espionage, sabotage, and other laws.

"Your committee is of the opinion that action should be taken to extend the limitations statute so that frauds may be discovered and punished *even after the termination of the present conflict,* and to insure that the limitations statute will not operate, under stress of the present-day events, for the protection of those who would defraud or attempt to defraud the United States." (Italics supplied.)

(6) S. Rep. No. 1057, 78th Cong., 2nd Sess., p. 14, states:

"As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this act and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before the advance to the stage of litigation."

Appellees' Petition for a Rehearing

Nos.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

Nos. 634, 635, 636

UNITED STATES OF AMERICA,
Appellant,
vs.
LESTER E. GRAINGER,
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.
JOSEPH C. CLAVERE and WILLIAM G. KENNEDY,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
vs.
JOSEPH C. CLAVERE, WILLIAM G. KENNEDY and A. L. SHAPIRO,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

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UNITED STATES OF AMERICA, *Appellant,*

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UNITED STATES OF AMERICA, *Appellant,*

vs.

JOSEPH C. CLAVERE, WILLIAM G. KENNEDY and A. L. SHAPIRO, *Appellees.*

APPELLEES' PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of defendants and appellees for a rehearing of the appeal herein is based upon the following grounds:

1. The decision appears to be in conflict with the decision in *United States of America v. Stanley Klinger,* No. 527, October Term, 1952, wherein Judge Learned Hand held that the statute of limitations barred any prosecution under the Wartime Suspension of Limitations Act[1] after December 31, 1949 which decision was affirmed by an equally divided Court. The decision in the above cause is likewise in conflict with the opinion of Mr. Justice Douglas in *United States v. Smith,* 342 U.S. 225.

2. That the decision in the above cause appears to be in conflict with its previous decision in *United States v. Scharton,* 285 U.S. 518, and likewise with the decision heretofore rendered in *United States v. McElvain,* 272 U.S. 633; also, *United States v. Noveck,* 271 U.S. 201.

3. A consideration of the opinion rendered in these cases would seem to indicate that a majority of the Court erroneously concluded that false statements made in a claim for money necessarily cause a pecuniary or property loss to the United States.

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[1] 18 *U.S.C.* (Supp. V) 3287.

POINT I.

Until the decision of the instant case, the gist of the pertinent decisions of this Court was that the Suspension Act (actually a predecessor identical in terms), did not apply unless the statutory definition of the offense charged expressly "denominated" such an offense as fraud or made fraud an essential element or ingredient thereof, which the Government must charge and prove to sustain the indictment issued under the statute creating such offense: See: *United States v. Noveck,* 271 U.S. 201; *United States v. McElvain,* 272 U.S. 633; *United States v. Scharton,* 285 U.S. 518.

Stated another way, the crime must be so described in the statute, that an indictment thereunder, failing to specifically charge fraud would be fatally defective and demurrable. See: *United States v. Scharton, supra,* where the Court (at page 521) pointed out that there are "numerous statutes expressly making intent to defraud an element of a specified offense under which an indictment failing to aver that intent would be defective".

In *United States v. Klinger* (C.C.A. 2, 1952), 199 F. (2d) 625 which decision was affirmed in appeal No. 527 October Term, 1952 by an equally divided Court, Judge Learned Hand held that as to offenses coming within the purview of the Suspension Act, the Act operated to suspend the bar of the applicable statute of limitations until December 31, 1949. To the contrary this Court in the instant cases, held

that the terminal point for prosecution was December 31, 1952. It is submitted that this Court's decision tends to do violence to the Congressional intent and the policy underlying the Suspension Act.

In *United States v. Smith*, 342 U.S. 225 this Court decided that the Suspension Act did not apply to offenses committed after December 31, 1946, the date of the termination of hostilities.

Speaking for the Court, Mr. Justice Douglas said:

> "Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly. *The time when law enforcement officers were busy with war activities is not counted; when the pressure was off, the time begins to run again. No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the suspension seem advisable.*" (Emphasis supplied.)

The Court's decision in the instant cases, in conjunction with its previous holding in the *Smith* case, produces an anomaly which could hardly have been contemplated by Congress. A fraud upon the United States committed on December 31, 1946 (or before) would be subject to a prosecution period of at least six years while the same offense committed on December 31, 1947 would be barred after three years. This Court in *Bridges v. United States*, 97 Fed. 975 stated (at page 983):

"To adopt the interpretation proposed by the Government would produce the situation that offenses committed in August, 1948, would be indictable until August, 1953, whereas like offenses committed in the following October, 1948 would not be indictable after October, 1957. *The longer period for the prosecution of the earlier offenses has no relation to war conditions. Such a result is not to be inferred without a clear direction to that effect.*" (Emphasis supplied.)

POINT II.

The Court in the instant cases held, in effect, that a false claim involving money or property is necessarily a fraud of a pecuniary nature. It is submitted that unless a defrauded party has sustained a loss of money or property as the result of the alleged misrepresentations in the claim, no pecuniary fraud is involved. In other words, the existence of a loss rather than the mere involvement of money or property should be the touchstone of a pecuniary fraud. There is no apparent reason why false representations, not resulting in a pecuniary loss, should be treated differently from false representations in reports to the OPA (*U. S. v. Klinger,* No. 527, October Term, 1952) or from false representations in a naturalization proceeding (*Bridges v. U. S.,* No. 548, October Term, 1952), or from false representations in a federal income tax return or the making of a false income tax return. (*U. S. v. Noveck,* 271 U.S. 201;

U. S. v. McElvain, 272 U.S. 633; *U. S. v. Scharton,* 285 U.S. 518.)

In substance, the indictments herein failing to charge a pecuniary loss to the Government, alleged no more than "administrative frauds" which this Court in the *Bridges* case held to be without the purview of the Suspension Act. In the light of the foregoing analysis, the distinction between these cases and the foregoing cases, and, especially, the distinction between these cases and the *Klinger* case (see page 12 of slip opinion in Nos. 634, 635 and 636, October Term, 1952) appears too tenuous to serve as a basis for the development of sound case law.

POINT III.

That the allegations in the indictments fall entirely short of charging a pecuniary fraud, can be readily demonstrated by reference to the purchasing procedure of the Commodity Credit Corporation as reflected in the form of "Wool Handler's Agreement (Shorn Wool)", War Food Administration, Commodity Credit Corporation Wool Form B (1945) in use during the period here involved. Section 8[2] of that form agreement entitled "Commodity's Purchase

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[2]Section 8 of the form of Wool Handlers' Agreement (Shorn Wool), War Food Administration, Commodity Credit Corporation, Wool Form B (1945) in use during the period involved in the indictments reads as follows:

"*Commodity's Purchase Price for Wool Purchased by Secondary Handler or Pool.* Commodity's purchase price for wool purchased from a secondary handler or a pool who

Price for Wool purchased by Secondary Handler or Pool" in effect, provided that a "secondary handler" selling wool to the Commodity Credit Corporation

purchased such wool from producers shall be an amount equal to the amount paid the producers for such wool plus:

(i) In the case of wool which the secondary handler or pool has collected in bulk from farms and transported at his or its own expense from farms to country assembly points, rough-graded at his or its own expense, packed at his or its own expense in his or its own bags, stored at his or its own expense prior to shipment to the Handler, and delivered or loaded on trucks or cars for shipment to warehouse of the Handler other than a local warehouse—two and one-half (2½) cents per pound, grease weight, for lots of 5000 pounds or more or one and three-fourths (1¾) cents per pound, grease weight, for lots of less than 5000 pounds;

(ii) In the case of wool which producers have delivered to the secondary handler or pool at country assembly points, including the secondary handler's or pool's warehouse and with respect to which the secondary handler has performed the other services specified in (i) above—two and one-fourth (2¼) cents per grease pound, for lots of 5000 pounds or more, or one and one-half (1½) cents per grease pound for lots of less than 5000;

(iii) In the case of wool with respect to which the Secondary Handler or pool has performed all of the services specified in either (i) or (ii) above one and one-half (1½) cents per grease pound for 5000 pounds or more, or one (1) cent per grease pound, for lots of less than 5000 pounds;

PROVIDED, HOWEVER, that such purchase price shall in no event exceed the appraisal value less the deductions specified in paragraph 7.

The Handler shall not accept wool purchased by a Secondary Handler unless such wool is accompanied by a certificate of the Secondary Handler, in form approved by Commodity, showing the quantity of wool purchased from and the name of each producer, the respective amounts paid or payable for such wool and containing a notation of the County Agricultural Conservation Committee for the County in which the Secondary Handler maintains his principal place of business that a copy of such certificate showing also the addresses of the producers covered thereby, has been filed with such County Committee.

The Handler shall not accept wool purchased by a Secondary Handler if such wool is commingled with wool received a Secondary Handler on consignment."

receive the purchase price he paid plus certain allowances or the market value of the wool as determined by an Appraisal Committee of the Commodity Credit Corporation, whichever was the *lower*. Accordingly, the Government could hardly sustain a loss even if the wool handler overstated his purchase price. No financial loss could conceivably result to the Government where the appraised value was lower than the *actual* purchase price whatever the price stated by the seller. In that case an overstatement of the purchase price would in no wise affect the action of the Government agency and would, indeed, be wholly immaterial; yet the overstatement would suffice to establish the making or presentation "for payment or approval" of a "false, fraudulent and fictitious claim" within the meaning of the false claims clause of the false claims statute and of the indictments herein. The mere possibility that a violation of the false claims clause of the False Claims Act,[3] as alleged in the indictments, could thus be proved without evidence of any pecuniary fraud, is sufficient to demonstrate that "a defrauding of the United States or any agency thereof" is *not* an essential element or ingredient of the statutory offenses charged herein. That the particular acts alleged *may* have involved fraud, or are labeled as "fraudulent" in the *indictments*, does not bring the offenses within the purview of the suspension act as has been readily conceded by the Government. (Government's Brief, pp. 8 and 9.)

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[3]35(A) of the Criminal Code, 52 Stat. 197, 18 U.S.C. 80.

Under this agreement, if the Secondary Handler purchased wool at 42¢ per pound and declared on his claim to have purchased it at 12¢ per pound and the Government appraised the wool at 34¢ per pound, he would be paid 12¢ per pound and the handler would still be filing a false claim for money, and yet the Government could not suffer a pecuniary or property loss. Yet, under these facts, the party making the claim would still be liable for a violation under the False Claims Act. Therefore, a pecuniary fraud is not an essential ingredient of a violation of the False Claims Act.

Dated, San Francisco, California,
July 27, 1953.

Respectfully submitted,
JOHN V. LEWIS,
JACK MILLER,
Attorneys for Appellees and Petitioners.

Certificate of Counsel

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

Dated, San Francisco, California,
July 27, 1953.

John V. Lewis,
Jack Miller,
Attorneys for Appellees and Petitioners.